JOHN T. FEY, Clerk

In the

UNITED STATES COURT OF APPEALS

for the Fourth Circuit

No. 7382

ISADORE D. BLUMENTHAL,
Appellant

vs.

LEON REINER and wife, BERTHA REINER,
Appellees

No. 7399

LEON REINER and wife, BERTHA REINER,
Appellants

vs.

ISADORE D. BLUMENTHAL,
Appellee

No. 7422

ISADORE D. BLUMENTHAL,
Appellant

vs.

LEON REINER and wife, BERTHA REINER,
Appellees

Appeal from The United States District Court
For The Western District of
North Carolina

MAURICE A. WEINSTEIN of
WEINSTEIN AND MUILENBURG
Liberty Life Building
Charlotte, N. C.

FRED B. HELMS and W. H. BOBBITT, JR.
of HELMS AND MULLISS
Law Building
Charlotte, N. C.

FILED

Counsel for Defendant,
I. D. Blumenthal

Rowan Printing Company, Salisbury, N. C.

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In The

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

COMPLAINT

LEON REINER AND WIFE, BERTHA REINER
Plaintiffs

vs.

ISADORE D. BLUMENTHAL

} COMPLAINT

The plaintiffs, complaining of the defendant, allege:

1. That the plaintiffs are citizens and residents of the State of New York.

2. That the defendant is a citizen and resident of Mecklenburg County, State of North Carolina.

3. That the matters in controversy exceed, exclusive of interest and costs, the sum of THREE THOUSAND DOLLARS ($3,000.00).

4. That the defendant on, or about, January 23, 1951, executed and delivered to the plaintiffs a promissory note in the following words and figures:

$10,000.00 January 23, 1951

On November 15, 1951, after date I promise to pay to the order of Bertha Reiner and Leon Reiner

Ten Thousand 00/00 DOLLARS
Payable at Commercial National Bank, Charlotte, N. C. This note is No. 1 of a series of 2 notes; that upon the default in the payment of any one of the notes the remaining notes shall immediately become due and payable without notice.

Value received I. D. Blumenthal

No. 1 Due Nov. 15, 1951

The following words and figures were written on the face of the above note:

$10,246.67
Fee 1.50
$10,248.17

Charlotte, N. C. Nov. 16, 1951

Protested for Non Payment
O. W. Bush
Notary Public

Fee: $1.50

5. The defendant on, or about January 23, 1951, executed and delivered to the plaintiffs a promissory note in the following words and figures:

$15,000.00 January 23, 1951

On November 15, 1952, after date I promise to pay to the order of Bertha Reiner and Leon Reiner

Fifteen Thousand 00/00 Dollars

Payable at Commercial National Bank, Charlotte, N. C.

This note is No. 2 of a series of 2 notes; that upon the default in the payment of any one of the notes the remaining notes shall immediately become due and payable without notice.
Interest at 3%

Value received I. D. Blumenthal

No. 2 Due Nov. 15, 1952

6. That the plaintiffs have made repeated demand on the defendant for the payment of the amounts due on the notes set out above, but the defendant has ignored the demands of the plaintiffs and has failed and refused to pay the principal amount of the notes set out above and the interest due thereon; that the defendant owes to the plaintiffs the respective amounts recited in said notes together with interest at the rate of three (3%) per cent per annum on the aforesaid $10,000.00 note from January 23, 1951, up to and including November 15, 1951, and thereafter at the rate of six (6%) per cent per annum from November 16, 1951, until paid and together with interest at the rate of three (3%) per cent per annum on the aforesaid $15,000.00 note from January 23, 1951, up to and including November 15, 1952, and thereafter at the rate of six (6%) per cent per annum from November 16, 1952, until paid; that no part of the principal or interest on either of the notes set out above has been paid and that plaintiffs are still the holders and owners thereof.

WHEREFORE, PLAINTIFFS DEMAND JUDGMENT AGAINST THE DEFENDANT:

(a) For the sum of $10,000.00 due on Note Number One set out in paragraph four above, dated January 23, 1951, together with interest thereon at the rate of three per cent per annum from January 23, 1951, up to and including November 15, 1951, and thereafter at the rate of six per cent per annum from November 16, 1951, until paid.

(b) For the sum of $15,000.00 due on Note Number Two set out in paragraph five above, dated January 23, 1951, together with interest thereon at the rate of three per cent per annum from January 23, 1951, up to and including November 15, 1952, and thereafter at the rate of six per cent per annum from November 16, 1952, until paid.

(c) For the costs accruing in this action.

COOLEY AND MAY,
Attorneys for Plaintiffs

HAROLD D. COOLEY
Nashville, North Carolina

HUBERT E. MAY
Nashville, North Carolina

ANSWER

Leon Reiner and wife, Bertha Reiner,

Plaintiffs,

-vs-

Isadore D. Blumenthal,

Defendant.

ANSWER

The defendant, answering the complaint, alleges:

1. The defendant does not have sufficient knowledge or information to form a belief as to the allegations of Paragraph 1 and the same are, therefore, denied.

2. The allegations of Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are admitted.

4. The allegations of Paragraph 4 are denied except to the extent that the same may be admitted hereinafter.

5. The allegations of Paragraph 5 are denied except to the extent that the same may be admitted hereinafter.

6. The allegations of Paragraph 6 are denied.

FIRST DEFENSE AND COUNTERCLAIM

1. That prior to January 2, 1948 the plaintiffs were partners doing business under the name of "L. & B. Reiner."

2. That on or about December 26, 1947 the plaintiffs filed or caused to be filed in the Department of State of the State of New York a "Certificate of Incorporation of L. & B.

Reiner, Inc.", in which Certificate Sara Goldsheid and the plaintiffs were named as incorporators.

3. That the plaintiffs represented to the defendant that thereafter, to-wit, on or about the 2nd day of January, 1948, a meeting of the incorporators named in the Certificate of Incorporation of L. & B. Reiner, Inc., hereinbefore referred to, was validly held, but that the defendant is informed and believes, and upon such information and belief alleges, that no valid organization meeting of the incorporators of L. & B. Reiner, Inc. was ever held.

4. That the defendant is informed and believes, and upon such information and belief alleges, that no directors of L. & B. Reiner, Inc. were elected at the purported meeting of incorporators purportedly held on January 2, 1948, or at any other time.

5. That the plaintiffs represented to the defendant that a meeting of the directors of L. & B. Reiner, Inc. was held on the 2nd day of January, 1948, but that the defendant is informed and believes, and upon such information and belief alleges, that no valid meeting of directors of L. & B. Reiner, Inc. was held on January 2, 1948, or at any other time.

6. That if a valid meeting of the directors of L. & B. Reiner, Inc. was held on January 2, 1948, which is again hereby denied, then the defendant is informed and believes, and upon such information and belief alleges, that at or near the beginning of the purported meeting of directors, if any was held, that Sara Goldsheid tendered her resignation as a director, which resignation was to be effective immediately, and that said resignation was then accepted.

7. That the defendant is informed and believes, and upon such information and belief alleges, that no director to suc-

ceed or to fill out the unexpired term of Sara Goldsheid was elected at the purported meeting of directors on January 2, 1948 or at any time thereafter, and that subsequent to the resignation of the said Sara Goldsheid as a director on January 2, 1948, the purported corporation known as L. & B. Reiner, Inc. never at any time had more than two directors.

8. That under the provisions of the Certificate of Incorporation of L. & B. Reiner, Inc. and under the provisions of the laws of the State of New York, the purported corporation known as L. & B. Reiner, Inc. was required to have at all times at least three directors and three stockholders.

9. That the defendant is informed and believes, and upon such information and belief alleges, that Sara Goldsheid, one of the subscribers named in the Certificate of Incorporation of L. & B. Reiner, Inc, was never a stockholder in the purported corporation known as L. & B. Reiner, Inc.

10. That no capital stock of the purported corporation known as L. & B. Reiner, Inc. was ever validly issued.

11. That on and prior to October 1, 1948 the plaintiffs falsely and fraudulently represented to the defendant that L. & B. Reiner, Inc. was a corporation duly organized, existing and doing business under the laws of the State of New York, with ninety (90) shares of no par value common capital stock validly issued and outstanding, which false and fraudulent representations were made to the defendant for the purpose of deceiving and inducing, and did deceive and induce, the defendant to purchase from the plaintiffs forty-five (45) shares of no par value common capital stock of the purported corporation known as L. & B. Reiner, Inc. at the price of One Hundred Ninety Thousand ($190,000.00) Dollars.

12. That on and prior to the 1st day of October, 1948, the plaintiffs made certain definite and specific representations to the defendant with reference to the volume of business, properties, assets, liabilities and good will of the purported corporation known as L. & B. Reiner, Inc., which said representations were materially false and were made by the plaintiffs with knowledge of such falsity, and which said representations were made to the defendant for the purpose and with the intent of defrauding the defendant and for the purpose of inducing the defendant to purchase from the plaintiffs forty-five (45) shares of the no par value common capital stock purportedly validly issued by L. & B. Reiner, Inc. and purportedly owned by the plaintiffs; that said false and fraudulent representations by the plaintiffs to the defendant were intended by the plaintiffs to be relied upon by the defendant and were reasonably relied upon by the defendant, and said false and fraudulent representations were made by the plaintiffs with the intent to deceive, and did deceive, the defendant and were further made by the plaintiffs for the purpose of inducing, and did reasonably induce, the defendant to agree to purchase from the plaintiffs forty-five (45) shares of the no par value common capital stock which the plaintiffs represented to the defendant was validly issued by L. & B. Reiner, Inc. and which the plaintiffs further represented were owned by the plaintiffs.

13. That as the result of the false and fraudulent representations of the plaintiffs to the defendant as hereinbefore set forth, the defendant, in reliance on the aforesaid representations, on or about October 1, 1948, agreed to purchase from the plaintiffs forty-five (45) shares of the no par value common capital stock purportedly issued by L. & B. Reiner, Inc., and as part purchase price therefor has heretofore paid to the plaintiffs the sum of Seventy-Five Thousand ($75,000.00) Dollars, Fifty Thousand ($50,000.00) Dollars of

which was paid on or about October 1, 1948 and Twenty-Five Thousand ($25,000.00) Dollars of which was paid on or about January 23, 1951, and that on or about January 23, 1951 the defendant signed the two notes set out in Paragraphs 4 and 5 of the complaint as part payment for the purchase price of the forty-five (45) shares of no par value common capital stock of L. & B. Reiner, Inc. purportedly issued by L. & B. Reiner, Inc.

14. That the payment of the aforesaid sum of Seventy-Five Thousand ($75,000.00) Dollars to the plaintiffs and the execution of the two notes referred to in Paragraphs 4 and 5 of the complaint, and any agreement by the defendant with the plaintiffs for the purchase of said purported capital stock or for the payment therefor, were all induced by the aforesaid false and fraudulent representations of the plaintiffs.

15. That the purported organization of L. & B. Reiner, Inc. by the plaintiffs was for the purpose and with the intent of cloaking and concealing the business operations and activities of the plaintiffs theretofore and thereafter carried on by them as individuals or as partners and for the purpose of deceiving and defrauding the public, including the defendant.

16. That no meeting of the Board of Directors, if any existed in the purported corporation known as L. & B. Reiner, Inc., were ever validly held, and that no meeting other than the purported meeting on January 2, 1948 was ever attempted or purported to have been held by the directors of L. & B. Reiner, Inc., the purported corporation.

17. That after the purported organization of L. & B. Reiner, Inc. the plaintiffs continued to operate said business

as individuals or partners and without any regard to corporate practices and procedures as required by the laws of the State of New York.

18. That the plaintiffs, as individuals and as partners, or as landlords, or otherwise, from time to time entered into contracts or agreements with the purported corporation known as L. & B. Reiner, Inc. without any valid corporate authorization by or on behalf of L. & B. Reiner, Inc.

19. That after the purported organization of L. & B. Reiner, Inc., the plaintiffs, individually or as partners, managed and conducted the business under the name of L. & B. Reiner, Inc. in a grossly negligent manner; that the plaintiffs knowingly and willfully deceived the customers of said business and the defendant; that the plaintiffs mistreated the customers and the employees of said business and destroyed the good will in connection therewith; that the plaintiffs willfully neglected the business known as L. & B. Reiner, Inc. and failed to properly attend to its affairs; that the plaintiffs, for their own gain and at great loss to the business known as L. & B. Reiner, Inc., interested themselves in and became active in other businesses and affairs and by their negligence and mismanagement permitted the business known as L. & B. Reiner, Inc. to suffer heavy losses and to lose its sources of merchandise, its customers and its employees.

20. That the plaintiffs, at all times after the purported organization of L. & B. Reiner, Inc., had and exercised complete control and domination of its finances, policies and business practices, and that such control and domination were used by the plaintiffs for the purpose of defrauding the defendant, and that said control, domination, mismanagement and fraudulent acts as hereinbefore more particularly set forth resulted in heavy losses to the business and to the defendant.

21. That the fraudulent plan and scheme of the plaintiffs and the conspiracy between the plaintiffs to cheat and defraud the defendant, from the inception thereof, have been actively pursued and continued by the plaintiffs up to the present time, with the result that the plaintiffs have heretofore obtained from the defendant the aforesaid sum of Seventy-Five Thousand ($75,000.00) Dollars and the execution of the aforesaid notes without the defendant having received a single penny as dividend, salary or any other remuneration or thing of any value whatsoever from the plaintiffs or from L. & B. Reiner, Inc., and that the defendant has never had the purported certificate for the purported shares of common capital stock in his possession except for the purpose of endorsing the purported certificate and immediately redelivering it to the plaintiffs; and that the plaintiffs, on November 15, 1951, declared that the said forty-five (45) shares of no par value common capital stock purportedly issued by L. & B. Reiner, Inc. and purportedly sold to the defendant by the plaintiffs were forfeited to the plaintiffs and have at all times since been and now are owned by the plaintiffs.

22. That the aforesaid matters and things are hereby specially pleaded in bar and by way of estoppel of any right or rights of the plaintiffs to institute, prosecute or maintain this action or recover anything of the defendant.

23. That on account of the matters and things hereinbefore set forth, the plaintiffs are indebted to the defendant, and the defendant is entitled to recover of the plaintiffs, the sum of Seventy-Five Thousand ($75,000.00) Dollars fraudulently obtained by the plaintiffs from the defendant, together with interest thereon from the date or dates of the payment thereof.

SECOND DEFENSE AND COUNTERCLAIM

1. That on account of the matters and things hereinbefore more particularly set forth and alleged in the defendant's First Defense and Counterclaim, which allegations are by reference made a part of this paragraph as fully as if the same were set out and repeated herein verbatim, the two promissory notes referred to in Paragraphs 4 and 5 of the complaint are null and void, in that the execution of said notes was procured through the fraudulent acts and representations of the plaintiffs as hereinbefore set forth, and in that the said promissory notes were and are without consideration, and in that there was and is a complete failure of consideration therefor, and that the defendant is entitled to recover from the plaintiffs the aforesaid sum of Seventy-Five Thousand ($75,000.00) Dollars paid to the plaintiffs by the defendant without consideration.

2. That the aforesaid matters and things are hereby specially pleaded in bar of any recovery by the plaintiffs in this action and as a counterclaim by the defendant against the plaintiffs for the recovery of the aforesaid sum of Seventy-Five Thousand ($75,000.00) Dollars.

THIRD DEFENSE AND COUNTERCLAIM

1. That if the defendant was or is liable to or obligated to the plaintiffs in connection with or on account of the promissory notes set out in Paragraphs 4 and 5 of the complaint or otherwise, all of which is again hereby expressly denied, then the plaintiffs agreed to purchase and did purchase from the defendant, on the 15th day of November, 1951, the said forty-five (45) shares of no par value common capital stock purportedly issued by L. & B. Reiner, Inc. at the then book value thereof according to the books and

records of the business known as L. & B. Reiner, Inc.; that on said date the book value of the said forty-five (45) shares of no par value common capital stock of L. & B. Reiner, Inc., according to the books and records of said business, was Fifty-Seven Thousand Six Hundred Forty-Five Dollars and Eight Cents ($57,645.08), and that if the two promissory notes referred to in the complaint are valid, which is again hereby expressly denied, then the plaintiffs are indebted to the defendant, and the defendant is entitled to recover of the plaintiffs by way of counterclaim, the difference between the said book value and the sum of said two promissory notes, being the sum of Thirty-Two Thousand Six Hundred Forty-Five Dollars ($32,645.00).

2. That if the jury should find or if the court should hold that the defendant is indebted to our obligated to the plaintiffs for the payment of the aforesaid two promissory notes, all of which is again hereby expressly denied, then the defendant is entitled to recover of the plaintiffs the sum of Thirty-Two Thousand Six Hundred Forty-Five Dollars ($32,645.00), as more particularly set forth in the paragraph next preceding.

WHEREFORE, having fully answered, the defendant prays:

1. That the plaintiffs have and recover nothing of the defendant.

2. That the defendant have and recover of the plaintiffs the sum of Seventy-Five Thousand ($75,000.00) Dollars on one or both of his First and Second Defenses and Counterclaims.

3. That if the jury should find or if the court should hold that the defendant is obligated or indebted to the

plaintiff for the payment of the two promissory notes referred to in the complaint, then and in that event that the defendant have and recover of the plaintiffs the sum of Thirty-Two Thousand Six Hundred Forty-Five Dollars ($32,645.00) as set out in the defendant's Third Defense and Counterclaim.

4. That the defendant have such other and further relief as he may be entitled to under the facts both in law and in equity.

Dated at Charlotte, North Carolina, this the 23rd day of June, 1953.

MAURICE A. WEINSTEIN
Attorney for the Defendant
1502 Liberty Life Building
Charlotte, North Carolina

REPLY

LEON REINER AND WIFE, BERTHA REINER,
Plaintiffs

vs.

ISADORE D. BLUMENTHAL,
Defendant

REPLY

The plaintiffs, replying to the first defense and counterclaim herein filed by the defendant, say:

1. That Article One is true and admitted.

2. That Article Two is true and admitted.

3. That Article Three is untrue and denied.

4. That Article Four is untrue and denied.

5. That Article Five is untrue and denied.

6. In replying to Article Six of the first defense and counterclaim, the plaintiffs admit that Sara Goldshied, one of the subscribers for stock in and a director of L. & B. Reiner, Incorporated, tendered her resignation as a director in said corporation on the second day of January, 1948, and that no person was thereafter elected to fill the vacancy created by the resignation of the said Sara Goldshied as a member of the Board of Directors of said corporation. All other allegations inconsistent with admissions herein made are untrue and are therefore denied.

7. In replying to Article Seven, the plaintiffs admit that no director was elected to fill the unexpired term of Sara

Goldsheid as a member of the Board of Directors of L. & B. Reiner, Incorporated, and that subsequent to the resignation of the said Sara Goldsheid, the corporation never at any time had more than two directors. Any allegations in said article inconsistent with the admissions herein made are untrue and therefore denied.

8. That Article Eight is untrue and denied.

9. In replying to Article Nine, the plaintiffs admit that Sara Goldshied, one of the original subscribers for stock in L. & B. Reiner, Incorporated, and a member of the Board of Directors of said corporation by virtue of the Certificate of Incorporation, resigned; that subsequent to the Incorporation of L. & B. Reiner, Incorporated, the said Sara Goldshied resigned as a director in said corporation and on the second day of January, 1948, executed "Assignment of Incorporator's Subscription" to Leon Reiner, said Assignment being a matter of record in the books of said corporation.

10. That Article Ten is untrue and denied.

11. That Article Eleven is untrue and denied.

12. In replying to Article Twelve, the plaintiffs deny each and every allegation of said article. Said article fails to allege a single definite and specific representation either true or false which could possibly have misled or deceived the defendant herein. The true facts in connection with the transaction referred to are as follows and not otherwise:

The defendant purchased stock in L. & B. Reiner, Incorporated, and agreed to pay therefor the sum of $190,000.00. Said stock was transferred and assigned to the said defendant and said defendant in turn reassigned and retransferred all of said stock to Leon Reiner and Bertha Reiner to be held

by them as collateral for the payment of the balance due for the purchase price of said stock, all of which assignments and transfers appear in the stock certificate book of said corporation. The books of said corporation and the public records pertaining to said corporation were at all times available to the defendant and the plaintiffs herein made no representations concerning the affairs of said corporation in the slightest degree inconsistent with all of the pertinent facts and circumstances.

13. That Article Thirteen is untrue and therefore denied. The plaintiffs admit that the defendant "agreed to purchase from the plaintiffs (45) shares of the no par value common capital stock" of L. & B. Reiner, Incorporated, but to date said defendant has failed to pay the purchase price agreed upon for said stock.

14. That Article Fourteen is untrue and denied.

15. That Article Fifteen is untrue and denied.

16. That Article Sixteen is untrue and denied.

17. That Article Seventeen is untrue and denied.

18. That Article Eighteen is untrue and denied.

19. That Article Nineteen is untrue and denied.

20. That Article Twenty is untrue and denied.

21. That Article Twenty-one is untrue and denied. The plaintiffs admit however that the stock was redelivered to the plaintiffs for the purpose of securing the payment of the balance of the purchase price for said stock; that said stock was actually in existence and was in the possession of the defendant.

The agreement between the plaintiffs and the defendant was reduced to writing and said written document became the monument of said agreement and the same is hereby by reference made a part of this Article to the same extent as if the same were herein copied verbatim; that said agreement was duly executed by the parties thereto; that said agreement is attached hereto and marked as plaintiffs "EXHIBIT A".

All agreements between plaintiffs and defendants were reduced to writing and signed and executed by the parties to be bound thereby.

22. In replying to Article Twenty-Two, the plaintiffs allege that they are not in any way barred or estopped to institute, prosecute or to maintain this action which is based upon promissory notes duly executed by the defendant pursuant to the written agreement referred to in the next preceding paragraph and attached hereto marked as plaintiffs Exhibit "A".

That in connection with the execution of said notes and said agreement and simultaneously therewith and as a definite part of said agreement, the defendant herein executed and delivered to the plaintiffs a written release, a copy of which is hereto attached and marked plaintiffs "Exhibit B" and by this reference is made a part of this article of this reply as fully and to the same extent as if the same were copied herein verbatim. The original of the same will be introduced in evidence if and when in the trial of this cause it becomes necessary and proper.

That the execution of the notes sued upon, the written agreement and the written release all are hereby specifically pleaded in bar of the rights of the defendant to assert any defense to this action or to prosecute any counterclaim

against the plaintiffs in this cause; that said written documents are hereby specifically pleaded as an estoppel of the defendant to assert any defense or counterclaim in this cause of action.

23. That Article Twenty-Three is untrue and denied.

SECOND DEFENSE AND COUNTERCLAIM

1. That Article One of the Second Defense and Counterclaim is untrue and denied.

That in said article, the defendant does not allege any specific representation or misrepresentation on the part of the plaintiffs or either of them.

2. In replying to Article Two of the second defense and counterclaim, the plaintiffs allege and reiterate that all agreements between the plaintiffs and the defendants herein were reduced to writing. The promissory notes herein sued upon were likewise reduced to writing and as a part of the transaction which took place on January 23, 1951, hereinabove mentioned and fully set out in "Exhibit A" hereto attached, the defendant in full possession of all of his faculties, and likewise in full possession of all of the facts, and fully aware of all of the circumstances, executed a general release and likewise executed the promissory notes and the written agreement herein referred to and hereto attached and made a part hereof.

THIRD DEFENSE AND COUNTERCLAIM

1. In replying to Article One of the third defense and counterclaim, the allegations as alleged are untrue and are therefore denied. The true facts in connection therewith being as hereinafter stated and not otherwise:

The defendant purchased from the plaintiffs (45) shares of no par value common capital stock of L. & B. Reiner, Incorporated, on the terms and conditions set forth in the written agreement, marked "Exhibit A", attached hereto and by this reference made a part of the plaintiffs reply to Article One of the Third defense and counterclaim.

2. In replying to Article Two of the defendants Third Defense and Counterclaim, the allegations are untrue and are therefore denied.

WHEREFORE, THE PLAINTIFFS HAVING FULLY REPLIED, HEREBY DEMAND JUDGMENT AGAINST THE DEFENDANT AS FOLLOWS:

(2) That the defendant's defenses and counterclaims be dismissed and that the plaintiffs recover of the defendant the costs herein incurred and that they have such other and further relief as they may be entitled to in the premises.

Dated at Nashville, North Carolina, this the 8th day of July, 1953.

COOLEY AND MAY
Attorneys for the Plaintiffs
Box 385
Nashville, North Carolina

EXHIBIT "A"

AGREEMENT made this 23rd day of January, 1951, by and between LEON REINER, 260 Paine Avenue, City of New Rochelle, New York, BERTHA REINER, 260 Paine Avenue, City of New Rochelle, New York, L. & B. REINER, INC., a domestic corporation, with its principal place of business at 139 East 23rd Street, Borough of Manhattan,

City of New York (hereinafter called "Corporation") and ISADORE D. BLUMENTHAL, 1720 Dowd Road, City of Charlotte, State of North Carolina (hereinafter called "Blumenthal").

WITNESSETH:

The parties have heretofore executed an agreement among them dated October 1, 1948 providing, among other things, for the sale by Leon Reiner and Bertha Reiner of forty-five (45) shares of the common stock of the Corporation to Blumenthal. The sum of $158,900.00, representing the balance of the purchase price thereof together with accrued interest, remains unpaid. The parties desire to modify and amend said agreement in accordance with the provisions hereinafter contained.

NOW, THEREFORE, the parties hereto do hereby mutually agree as follows:

1. (a) The agreement between the parties heretofore executed and dated October 1, 1948 is hereby terminated and cancelled and shall be void and of no further effect.

(b) All promissory notes executed by Blumenthal, pursuant to the terms of said agreement, shall be cancelled and returned to Blumenthal.

2. The sum of $158,900.00, representing the unpaid balance of the purchase price for forty-five (45) shares of the common stock of the Corporation sold by Leon Reiner and Bertha Reiner to Blumenthal pursuant to the terms of the aforesaid agreement, shall be paid as follows:

(a) Simultaneously with the execution of this agreement, Blumenthal will pay to Leon Reiner and Bertha Reiner jointly the sum of $25,000.00.

(b) Simultaneously with the execution of this agreement, Blumenthal will execute and deliver to Leon Reiner and Bertha Reiner two (2) promissory notes payable to their order with interest at three (3%) per cent per annum as follows: one note in the face amount of $10,000.00 payable on November 15, 1951 and one note in the face amount of $15,000.00 payable on November 15, 1952. Said notes shall provide that in the event the note first due is not paid on its due date, then the second note shall forthwith become due and payable.

(c) In the event of a default in the payment of either of the aforesaid notes, Leon Reiner and Bertha Reiner jointly shall forthwith be deemed to have purchased the said forty-five (45) shares of stock now owned by Blumenthal in the same manner as if an offer to sell the same had been made by Blumenthal at the book value thereof. The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive, Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute any action at law or otherwise to enforce collection of same.

(d) The balance of $108,900.00 with interest at three (3%) per cent from the date hereof shall thereafter be payable only out of dividends paid on the corporate stock now owned by Blumenthal, corporate salaries and bonuses or any other sums, if any, that may become due or payable to Blumenthal from the corporation. Blumenthal does hereby authorize the Corporation to pay over to Leon Reiner and Bertha Reiner jointly all such dividends, salaries and bonuses or any other sums, if any, that may become due and payable to him at any time on or prior to September 1, 1958, to be applied against said balance of $108,900.00 until the same, plus accrued interest at three (3%) per cent, has been fully

paid and discharged. If any balance, as aforesaid, remains unpaid on September 1, 1958, Blumenthal does hereby sell, transfer and assign the forty-five (45) shares of the corporate stock now owned by him to Leon Reiner and Bertha Reiner jointly, the purchase price to be the amount of said balance which shall be credited in full payment of said balance and said shares shall be and become the sole property of Leon Reiner and Bertha Reiner without any right of redemption thereto in Blumenthal with the same force and effect as if Blumenthal had offered the same for sale to Leon Reiner and Bertha Reiner at the amount of said balance and Leon Reiner and Bertha Reiner had accepted said offer.

(e) In the event of a dissolution or liquidation of the Corporation, any sums that may become due and payable as a result thereof on the shares of corporate stock now held by Blumenthal, are hereby assigned to Leon Reiner and Bertha Reiner jointly to apply against the balance of $108,500.00 with interest as aforesaid and only the surplus, if any, shall be delivered to Blumenthal.

3. Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum.

4. Blumenthal holds a corporate note payable to his order in the face amount of $10,000.00. Leon Reiner holds a note executed by Blumenthal to the order of Leon Reiner in the face amount of $10,000.00 and a corporate note in the face amount of $10,000.00 as reduced to $8,000.00 by payments. Simultaneously with the execution hereof, Blumenthal will surrender the aforesaid corporate note to the corporation and Leon Reiner will surrender to the corporation said note

in the sum of $10,000.00 as reduced to $8,000.00 held by him and cancel and surrender to Blumenthal said $10,000.00 note. The Corporation will thereupon execute and deliver to Leon Reiner a note payable to his order on demand in the sum of $3,500.00 with interest at four (4%) per cent.

5. The parties intend to maintain the capital of the Corporation by reimbursing it for any losses sustained during each fiscal year until September 1, 1958, thereby maintaining an adequate working capital. The parties also intend to make loans to the Corporation whenever the Corporation needs additional working capital. Such contributions shall be made in accordance with the respective interests of the individual parties as holders of the capital stock of the Corporation. Until September 30, 1951, Blumenthal shall not be required to make any such contributions and if during said period Leon Reiner and Bertha Reiner make such contributions to the Corporation, Blumenthal will at any time after September 30, 1951 and upon ten (10) days written notice forthwith reimburse Leon Reiner and Bertha Reiner for fifty (50%) per cent of any such contributions. Thereafter, each of the parties will pay to the Corporation their proportionate share of any loss sustained by the Corporation during any six month period of any fiscal year within fifteen (15) days after notification of the amount of said loss as determined by the corporate accountants. Such contributions when made shall constitute loans to the Corporation and be entered upon the books of the Corporation as such. In the event Blumenthal fails to pay to the Corporation the amount required by said notice within ten (10) days, the same shall be deemed an acceptance by Leon Reiner and Bertha Reiner of an offer by Blumenthal to sell his said shares in the same manner as if default was made pursuant to the provisions of Article "2(c)" hereof.

6. Until the full amount of the balance due hereunder by Blumenthal shall have been paid, Leon Reiner will continue as president and general manager of the Corporation and receive a salary of $15,000.00 a year payable monthly. Blumenthal and Bertha Reiner shall receive equal salaries in amounts fixed by the Board of Directors dependent upon the earnings of the Corporation.

7. Blumenthal will not sell, transfer, assign or enlien the forty-five (45) shares of the corporate stock now owned by him unless he shall first offer the same for sale to Leon Reiner and Bertha Reiner jointly, at such price as shall have been offered to Blumenthal by a bona fide offer of purchase. Such offer to sell shall be made to Leon Reiner and Bertha Reiner in writing. In the event of acceptance by Leon Reiner and Bertha Reiner of said offer to sell, closing shall be held within thirty (30) days after written notice of acceptance. Failing such bona fide offer of purchase at more than the book value of said stock, Leon Reiner and Bertha Reiner may purchase said stock at the said book value. At closing, if the stock is sold to Leon Reiner and Bertha Reiner, they shall credit against the purchase price any balance still due on the purchase price of said stock or on any of said notes executed by Blumenthal. If, however, said stock is sold, pursuant to the terms hereof, to persons other than Leon Reiner and Bertha Reiner, then the entire purchase price or so much thereof as is necessary to pay the unpaid balance still due under the provisions of Article "2" hereof shall be paid to Leon Reiner and Bertha Reiner.

8. Book value shall be ascertained in accordance with approved and accepted methods of accountancy applicable to the type of business engaged in by the Corporation. In making such computation, the following, among other things, must be strictly adhered to:

(a) Make appropriate allowance for all liabilities of the Corporation, and an appropriate reserve for all bad debts and all unmatured and contingent liabilities, including, but not limited to, claims in litigation or as to which litigation is threatened or prospective, and the legal and other expenses in connection therewith, Federal, State, Municipal or other taxes that may be imposed, or levied upon the Corporation and/or its right to do business and/or upon the earnings or profits thereof including a reserve for taxes on profits from the close of the last fiscal year to the end of any season not ending with the close of any fiscal year.

(b) Evaluate inventory at cost or market, whichever is lower.

(c) Trade marks, trade names, patents, copyrights, franchises, good will and other intangible property shall be deemed of no value unless paid for in cash, in which event, the actual amount paid in cash, shall be taken as the value.

(d) Accounts receivable shall be taken at the amounts carried on the books less an appropriate reserve for all discounts, returns and bad accounts.

(e) Furniture and fixtures shall be evaluated at cost less an appropriate reserve for depreciation and obsolescence.

9. The books and records of the Corporation shall be made available for study and analysis to a certified public accountant chosen by Blumenthal at least once during each fiscal year at such time as may be chosen by Blumenthal.

10. (a) Upon the death of either Leon Reiner or Bertha Reiner, the survivor of them shall have the sole right to purchase the stock of the deceased party.

(b) Upon the death of Blumenthal or the survivor of Leon Reiner and Bertha Reiner, the surviving individual parties shall have the option to purchase all but not a part only of the stock of the deceased party within thirty (30) days after receipt of notice of the appointment and qualification of the executor or administrator, or thirty (30) days after receipt of notice of the transfer of said shares of stock to the legatees (as the case may be); and upon the exercise of said option, said executor, administrator or legatee (as the case may be) shall be required to sell said shares of stock to the surviving individual parties.

(c) In the event the surviving individual parties fail to exercise their options to purchase the stock of the deceased party as aforesaid, they shall at the request of the executor, administrator or legatees (as the case may be) forthwith call a special meeting of stockholders and directors of the Corporation for the purpose of dissolving and liquidating the Corporation and shall at said meeting vote all of their stock in the Corporation for an immediate dissolution and liquidation of said Corporation.

(d) The purchase price of each share of stock shall be the book value thereof, except that the purchase price of Blumenthal's shares shall be one-half (½) of the book value thereof and there shall be credited against said purchase price any balance still due to Leon Reiner and Bertha Reiner on account of the purchase price or on said notes delivered pursuant to the terms of this agreement. Payment shall be made in five (5) equal annual installments commencing with closing.

11. The parties acknowledge that except for the obligations created by this instrument neither of the parties have any obligations of any kind or sort to each other, and formal

instruments of general release to that effect will be executed and exchanged.

12. The actions heretofore commenced by the service of summons in the Supreme Court of the State of New York, County of New York, entitled LEON REINER, Plaintiff, against ISADORE D. BLUMENTHAL, Defendant, and BERTHA REINER, Plaintiff, against ISADORE D. BLUMENTHAL, Defendant, shall be discontinued and a stipulation to that effect shall be executed simultaneously herewith.

13. The certificates representing the stock of the Corporation owned and held by the parties hereto shall have a legend inscribed thereon that they are issued and held subject to and in accordance with the provisions of this agreement.

14. None of the provisions herein contained may be altered, changed, amended or modified during the term of this agreement in any manner other than by the consent of all the parties hereto in writing, nor shall any waiver by any party of the strict performance of any of the terms, conditions and provisions of this agreement constitute a waiver thereof for the future but shall be considered a waiver only in the particular instance, for the particular purpose, and at the time when and for which it is given.

15. Any and all notices required to be given under the terms of this agreement shall be sent by registered mail, return receipt requested, and addressed to the parties herein at their addresses set forth above, or at such other address as may be designated by the parties in writing to the other parties hereto.

16. This agreement shall be binding on the parties hereto, their heirs, executors, administrators and legatees.

IN WITNESS WHEREOF, the parties hereto have signed this agreement the day and year first above written.

/s/ LEON REINER

/s/ BERTHA REINER

L. & B. REINER, INC.

By Leon Reiner, Pres.

/s/ I. D. BLUMENTHAL

"EXHIBIT B"

To all to whom these Presents shall come or may concern, GREETING: Know ye, that I, ISADORE D. BLUMENTHAL, residing at 1720 Dowd Road, Charlotte, North Carolina, and being over the age of 21 years, for and in consideration of the sum of One ($1.00) Dollar and other good and valuable considerations, lawful money of the United States of America to be in hand paid by LEON REINER and BERTHA REINER, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged and by these presents do for myself, my heirs, executors, and administrators and assigns, remise, release and forever discharge the said LEON REINER and BERTHA REINER, their heirs, executors, administrators, successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, execution, claims and demands whatsoever, in law, in admiralty, or in equity, which against (blank) ever had, now have or which I or my heirs,

executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

There shall be excepted from this release all rights, liabilities, and obligations created by an instrument between Leon Reiner, Bertha Reiner, Isadore D. Blumenthal and L. & B. Reiner, Inc. Dated January 23, 1951.

This release may not be changed orally.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 23rd day of January in the year one thousand nine hundred and fifty-one.

Sealed and delivered in the presence of

/s/ I. D. BLUMENTHAL

EXHIBIT "C"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LEON REINER
Plaintiff

—against—

ISADORE D. BLUMENTHAL
Defendant

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the above entitled action be and the same is hereby discontinued without costs to either party.

Dated: New York, January 23, 1951.

BLUMBERG, MILLER,
ABERMAN & SINGER
Attorneys for Plaintiff

HAYS, WOLF, SCHWABACHER,
SKLAR & EPSTEIN

MOTION FOR SUBMISSION OF ISSUES

LEON REINER, and wife,
BERTHA REINER,
Plaintiffs,

vs.

ISADORE D. BLUMENTHAL,
Defendant.

CIVIL ACTION
NO. 936
MOTION

The defendant, pursuant to Rule 49 of the Federal Rules of Civil Procedure, at the close of all the evidence and before the retirement of the jury, moves the Court that the following issues be submitted to the jury:

1. Did the defendant execute the note dated January 23, 1951, in the amount of $10,000?

Answer:

2. Did the defendant execute the note dated January 23, 1951, in the amount of $15,000?

Answer:

3. What amount of cash, if any, has the defendant paid upon said notes?

Answer:

4. What was the book value on November 15, 1951, of the forty-five (45) shares of stock issued to the defendant?

Answer: By stipulation: $55,949.70.

5. What credit, if any, was the defendant entitled to against said notes on November 15, 1951, by reason of the purchase by the plaintiffs from the defendant on November 15, 1951, of the forty-five (45) shares of stock issued to the defendant?

Answer:

6. Should the surplus of the purchase price at book value of the forty-five (45) shares of stock issued to the defendant, over the credit on the two notes, be paid to the defendant?

Answer:

7. Was the execution of the two notes dated January 23, 1951, in the amounts of $10,000 and $15,000 induced by fraud on the part of the plaintiffs as alleged in the first defense and counterclaim of the defendant?

Answer:

8. Was there a total failure of consideration for the execution of the two notes dated January 23, 1951, in the amounts of $10,000 and $15,000 as

alleged in the second defense and counterclaim of the defendant?

Answer:

Dated: October 11, 1956.

HELMS AND MULLISS

By: Fred B. Helms

WEINSTEIN AND MUILENBURG

By: Maurice A. Weinstein
Attorneys for Defendant.

REQUEST FOR INSTRUCTIONS

LEON REINER, and wife, BERTHA REINER,
Plaintiffs,

vs.

ISADORE D. BLUMENTHAL,
Defendant.

CIVIL ACTION NO. 936

REQUEST FOR INSTRUCTIONS

The defendant at the close of all the evidence moves the Court to give to the jury the following instructions on the following issues:

1. On the issue:

"What credit, if any, was the defendant entitled to against said notes on November 15, 1951, by reason of the purchase

by the plaintiffs from the defendant, on November 15, 1951, of the forty-five (45) shares of stock issued to the defendant?", the

Instruction:

"If the jury, by the greater weight of the evidence, find the facts to be as all the evidence tends to show, the jury will answer that issue:

'$25,000.00, plus interest as specified in the notes from January 23, 1951, to November 15, 1951.'"

2. On the issue:

"Should the surplus of the purchase price at book value of the forty-five (45) shares of stock issued to the defendant over the credit on the two notes, be paid to the defendant?", the

Instruction:

"If the jury, by the greater weight of the evidence, find the facts to be as all the evidence tends to show, the jury will answer that issue:

'Yes'."

Dated October 11, 1956.

HELMS AND MULLISS

By: Fred B. Helms

WEINSTEIN AND MUILENBURG

By: Maurice A. Weinstein
Attorneys for Defendant.

THE ISSUES SUBMITTED (R.p. 539)

1. Did the defendant execute the two notes, one in the sum of $10,000.00 and the other in the sum of $15,000.00, each dated January 23, 1951, as is alleged in the complaint?

Answer: Yes, by consent.

2. In what amount, if any, is the defendant indebted to the plaintiffs as alleged in the complaint?

Answer:

JUDGMENT OF OCTOBER 11, 1956

IN THE DISTRICT COURT OF THE UNITED STATES

For The Western District of North Carolina

Charlotte Division

LEON REINER, and wife, BERTHA REINER,

Plaintiffs,

vs.

ISADORE D. BLUMENTHAL

Defendant.

JUDGMENT

This cause, coming on to be heard before His Honor, Wilson Warlick, and a jury, at this the October 8, 1956, regular civil term of the United States District Court for the Western District of North Carolina, Charlotte Division, and being heard, and issues having been submitted to and answered by the jury as the same appear of record:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiffs have and recover nothing of the defendant, and that the plaintiffs pay the court costs to be taxed herein.

The court having declined to submit issues on the several counterclaims of the defendant against the plaintiffs, tendered by the defendant, it is further ordered, adjudged and decreed that the defendant have and recover nothing of the plaintiffs on either Counterclaim 1, or Counterclaim 2, or Counterclaim 3.

This the 11th day of October, 1956.

/s/ Wilson Warlick

Judge U. S. District Court

To so much of the foregoing Judgment as adjudicates that the plaintiffs have and recover nothing and pay the cost, the plaintiffs except.

/s/ Wilson Warlick

Judge U. S. District Court

To the ruling of the Court in refusing to submit issues requested by the defendant on his first, second and third counterclaims and to the judgment of the Court denying recovery on the said first, second and third counterclaims of the defendant, the defendant excepts. This 17th day of October, 1956.

HELMS AND MULLISS

By: Wm. H. Bobbitt, Jr.,
Attorneys for Defendant.

MEMORANDUM DECISION

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

CIVIL ACTION 936

LEON REINER, and wife, BERTHA REINER, *Plaintiffs*, vs. ISADORE D. BLUMENTHAL, *Defendant*.	MEMORANDUM DECISION

WARLICK, District Judge

This is a motion for judgment, *Non Obstante Veredicto*, made by plaintiffs within ten days after the reception of a verdict against them by the jury, under preemptory instructions given by the court in the trial of the cause. The motion is made under Rule 50 (b) of the Federal Rules of Civil Procedure. The trial of the case was had during the second week of 1956 fall term at Charlotte. In order that a complete understanding of the matters involved be had, it is necessary to make specific findings of fact from the testimony heard at the trial. Motions for directed verdicts were made as Rule 50 requires, and being denied, brought about the submission of the matter to the jury, and a return of its verdict.

This action was brought for the purpose of a recovery on two notes, each dated January 23, 1951, executed by defend-

ant, and payable to the plaintiffs; one note for $10,000 due November 15, 1951, and payable at the Commercial National Bank, Charlotte, North Carolina, with interest at 3%, the other note being for $15,000, due November 15, 1952, and similarly payable at the Commercial National Bank, Charlotte, North Carolina, and bearing a like rate of interest. A failure to pay the first note accelerated the right to demand payment of the second note. Neither of said notes has been paid, and the whole thereof, together with interest, is due and owing.

The plaintiffs and the defendant are of the same race of people. The plaintiff, Leon Reiner, and defendant, Blumenthal, had known each other for approximately forty years, at the time of the trial, and are about the same age. They have engaged in numerous business transactions through the years, and have had much in common, socially and economically. Both are well educated and each is highly experienced in the business world. Evidently until their difficulties came about they had a high regard for each other.

During the late nineteen thirties plaintiffs had secured the exclusive rights to a large territory in the United States, and especially embracing the New York area, from a number of surgical and medical equipment manufacturers, especially those producing metabolism equipment, X-Ray properties, and electrograph appliances, and entered into the business of a distribution of these properties through lease and sale, and that of servicing all of that type of medical equipment,—carrying this business on under the terms of a partnership agreement.

On December 26, 1947, plaintiffs and a third person filed an application for a certificate of incorporation with the proper authorities in New York State, and were issued on

January 2, 1948 a corporate charter under the name of L. & B. Reiner, Inc., with its principal place of business at 139 East 23 Street, Borough of Manhattan, City of New York. Ninety shares of common stock was duly authorized and issued and thereafter L. & B. Reiner became the owners of the whole of the said stock. The corporation enjoyed a considerable measure of success and on the first day of October, 1948, the defendant Blumenthal purchased 45 shares of said stock from plaintiffs, paying therefor the sum of $190,000; $50,000 was paid in cash and twenty promissory notes totalling $140,000 payable to plaintiffs were executed and delivered by Blumenthal. The 45 shares of stock purchased by Blumenthal was endorsed as collateral for the payment of the notes due plaintiffs for the purchase thereof.

The plaintiffs and the defendant were duly elected officers of the corporation with the defendant Blumenthal being named as executive vice-president. Though the business was evidently a profitable one, no dividends were declared and paid on the common stock, the profits being retained in the corporation and used in the development of the business.

None of the notes executed and delivered by the defendant to the plaintiffs for the payment of the purchase price of the 45 shares of stock purchased by him were paid; considerable correspondence looking toward the collection of the notes came about—much discussion seemingly was had, and finally some time shortly prior to January 23, 1951, the defendant went to New York in an effort to work out some satisfactory means of taking care of his obligations, since the amount of these unpaid obligations reflected against any financial statement made by defendant. These meetings evidently got nowhere, and while the defendant was in New York he was served with a summons issuing out of the Supreme Court of New York, in which action the plaintiffs

were seeking to collect the amounts due them by the notes theretofore executed and delivered by the defendant.

A copy of the complaint was not served on the defendant at the time of the service of the summons,—an extension being given, but in the ensuing talks and negotiations the defendant was fully apprised of the nature of the action and that its purpose was to secure judgment for the amount of the twenty notes totalling $140,000 and interest, due plaintiffs, and for a foreclosure of the collateral. Being thus acquainted with its purpose and after some negotiations the defendant shortly afterward returned to Charlotte, conferred with his regular counsel, Mr. Weinstein, and sometime later returned to New York and employed Judge Epstein, an outstanding member of the New York Bar, now Judge of the Supreme Court of New York, to represent him in said action.

Plaintiffs were represented by Judge Miller, likewise an outstanding member of the New York Bar, now deceased.

Defendant fully acquainted Judge Epstein with all of the many factors involved in the said action, his position, defenses, etc., and after considerable negotiations between counsel and the parties, lasting approximately a week, the contract offered in evidence as plaintiffs' exhibit No. 3 and dated January 23, 1951 was executed by the parties. Certain parts of the said contract directly pertinent to this inquiry are herewith copied:

"The parties have heretofore executed an agreement among them dated October 1, 1948, providing, among other things, for the sale by Leon Reiner and Bertha Reiner of the forty-five (45) shares of the common stock of the Corporation to Blumenthal. The sum of $158,900.00, representing the balance of the purchase

price thereof together with accrued interest, remains unpaid. The parties desire to modify and amend said agreement in accordance with the provisions hereinafter contained.

NOW, THEREFORE, the parties hereto do hereby mutually agree as follows:

1. (a) The agreement between the parties heretofore executed and dated October 1, 1948 is hereby terminated and cancelled and shall be void and of no further effect.

(b) All promissory notes executed by Blumenthal, pursuant to the terms of said agreement, shall be cancelled and returned to Blumenthal.

2. The sum of $158,900.00, representing the unpaid balance of the purchase price of forty-five (45) shares of the common stock of the Corporation sold by Leon Reiner and Bertha Reiner to Blumenthal pursuant to the terms of the aforesaid agreement, shall be paid as follows:

(a) Simultaneously with the execution of this agreement, Blumenthal will pay to Leon Reiner and Bertha Reiner jointly the sum of $25,000.00.

(b) Simultaneously with the execution of this agreement, Blumenthal will execute and deliver to Leon Reiner and Bertha Reiner two (2) promissory notes payable to their order with interest at three (3%) per cent per annum as follows: one note in the face amount of $10,000.00 payable on November 15, 1951 and one note in the face amount of $15,000.00 payable on November 15, 1952. Said notes shall provide that in the

event the note first due is not paid on its due date, then the second note shall forthwith become due and payable.

(c) In the event of the default in the payment of either of the aforesaid notes, Leon Reiner and Bertha Reiner jointly shall forthwith be deemed to have purchased the said forty-five (45) shares of stock now owned by Blumenthal in the same manner as if an offer to sell the same had been made by Blumenthal at the book value thereof. The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive. Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute any action at law or otherwise to enforce collection of same.

(d) The balance of $108,900.00 with interest at three (3%) per cent from the date hereof shall thereafter be payable only out of dividends paid on the corporate stock now owned by Blumenthal, corporate salaries and bonuses or any other sums, if any, that may become due or payable to Bluementhal from the Corporation. Blumenthal does hereby authorize the Corporation to pay over to Leon Reiner and Bertha Reiner jointly all such dividends, salaries, and bonuses or any other sum, if any, that may become due and payable to him at any time on or prior to September 1, 1958, to be applied against said balance of $108,900.00 until the same, plus accrued interest at three (3%) per cent, has been fully paid and discharged. If any balance, as aforesaid, remains unpaid on September 1, 1958, Blumenthal does hereby sell, transfer and assign the forty-five (45) shares of the corporate stock now owned by him to Leon Reiner and Bertha Reiner jointly, the purchase

price to be the amount of said balance which shall be credited in full payment of said balance and said shares shall be and become the sole property of Leon Reiner and Bertha Reiner without any right or redemption thereto in Blumenthal with the same force and effect as if Blumenthal had offered the same for sale to Leon Reiner and Bertha Reiner at the amount of said balance and Leon Reiner and Bertha Reiner had accepted the said offer.

(e) In the event of a dissolution or liquidation of the Corporation, any sums that may become due and payable as a result thereof on the shares of corporate stock now held by Blumenthal, are hereby assigned to Leon Reiner and Bertha Reiner jointly to apply against the balance of $108,500.00 with interest as aforesaid and only the surplus, if any, shall be delivered to Blumenthal.

3. Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum."

According to the terms of this contract and in consequence thereof, the defendant paid the plaintiffs the sum of $25,000 in cash and simultaneously therewith as is provided, executed his two promissory notes, one for $10,000 payable on November 15, 1951 and another for $15,000 payable on November 15, 1952. Whereupon plaintiffs cancelled and surrendered to the defendant his twenty notes aggregating $140,000 and interest. Likewise in the same series of transactions a certificate of stock for forty-five (45) shares was issued to the defendant and was simultaneously endorsed

over to the plaintiffs to be held by them as the terms of the contract prescribed.

Plaintiffs insisted all along during the negotiations that if certain favorable considerations were shown the defendant as he earnestly requested, that he would have to pay $50,000 in cash on the original debt of $140,000, but on its being made to appear that the defendant was unable to raise more than $25,000 at that time it was then agreed that his two notes payable as herein would be acceptable in lieu of a similar sum in cash.

The defendant defaulted in the payment of the first note of $10,000 due November 15, 1951, and likewise worked a default in the payment of the note for $15,000 due November 15, 1952. Thereafter this action was instigated. It has had a tedious progress.

Various delays in the filing of pleadings resulted, many different interrogatories were submitted, reciprocal motions for summary judgment were heard and finally the decks were cleared and the matter came on and was heard before the jury as these findings indicate.

The defendant admitted the execution of the two notes and his failure to pay them as they matured; that they are now outstanding. He contends however, that they were paid and as such should be cancelled and surrendered, for that when the plaintiffs took possession of the forty-five (45) shares of stock they had contracted and agreed in the contract of January 23, 1951 to pay therefor the book value of said stock on the date of the default in the payment of the notes; that the book value of said stock on that date was $55,949.70 under the computation agreed to in the contract and that the notes should be credited with so much of said

amount as appeared necessary and that such credit would thereupon extinguish the amount of said notes.

In my preemptory instructions to the jury I adopted the contentions of the defendant as representing a fair interpretation of the contract between the parties. A subsequent study in the calm atmosphere of one's chambers under the motion filed has changed my thinking and it is now my opinion that the motion for judgment N. O. V. should be granted and that plaintiffs should recover of the defendant the face value of the two notes sued on, together with interest and costs. I come to this conclusion among other things for that,—

The evidence shows that on January 23, 1951 defendant was indebted to the plaintiffs in the sum of $158,900 as evidenced by twenty notes, and that an action seeking a recovery of such sum had been instituted by plaintiffs in the Supreme Court of New York. On such date reputable counsel had been retained by both parties and that said agreement entered into on said date was in compromise and full settlement, accord and satisfaction of all of such indebtedness, and represented a meeting of the minds of the parties; that stipulations discontinuing the action were entered into closing the door to all matters prior to such date. That defendant executed the two promissory notes in the full sum of $25,000 pursuant to the terms of said agreement; that defendant failed and refused to pay the first note and thereupon accelerated the right to demand payment of the second note. That the contract of January 23, 1951 shows that in consideration of the payment by the defendant to the plaintiffs of the sum of $25,000 in cash and the execution of two notes now sued on in the sum of $25,000, and regarded as cash, that plaintiffs thereupon released the defendant from any personal liability for the remaining amount due of $108,-

900; for that the evidence shows that no payment has been made on the balance of $108,900 except that represented by the transfer of stock in L. & B. Reiner, Inc., to the plaintiffs under date of November 15, 1951 when defendant defaulted, and that the rights of the parties are to be determined wholly under the terms of the contract of January 23, 1951. Further, under said contract it is my studied opinion that the forty-five (45) shares of stock were substituted for the personal liability of the defendant as the only source of payment of the $108,900; and that the dividends and any other income, together with the book value of the said stock was set aside and pledged as the only security for the said payment; and finally, for that a reasonable interpretation of the contract shows that when the defendant voluntarily defaulted in the payment of the first note due on November 15, 1951, that such default effected a transfer of the forty-five (45) shares of stock belonging to the defendant to the plaintiffs and at the book value of $55,949.70. That this was in full satisfaction of the amount of $108,900 due, and that no part of this sum could lawfully be applied under the terms of the contract to the personal obligations of the defendant on his two promissory notes. That the parties had expressly so contracted.

I am therefor setting aside the verdict and the judgment entered in the record on the 11th day of October, 1956 in favor of the defendant and will enter judgment in accordance with the motion of the plaintiffs for a directed verdict.

Rule 50 (b) Federal Civil Procedure. Montgomery Ward & Co. v. Duncan, 61 S. Ct. 189, 311, U. S. 243,85 L. Ed. 147. Galloway v. U. S. 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458. Consev. West Virginia Pulp & Paper Co. 330 U. S. 212, 67 S. Ct. 752, 91 L. Ed. 849. Globe Liquor Co. Inv. v. Sam Roman, 332 U. S. 571, 68 S. Ct. 246, 92 L. Ed.

177. Eckentrode v. Pennsylvania R. Co., 69 S. Ct. 91, 335 U. S. 329, 93 L. Ed.—Johnson v. N. Y., N. H. & H. R. Co. 73 S. Ct. 125, 344 U. S. 48.

Verdict for plaintiffs for $25,000, interest and costs. Submit decree.

This the 20th day of December, 1956.

WILSON WARLICK
United States District Judge for the
Western District of North Carolina

EXCEPTIONS TO MEMORANDUM DECISION

LEON REINER, and wife, BERTHA REINER,
Plaintiffs,
vs.
ISADORE D. BLUMENTHAL,
Defendant.

OBJECTIONS AND EXCEPTIONS

Prior to the entry of final judgment, the defendant made the following objections:

To the action of the Court in entertaining and considering the plaintiff's Motion for Judgment Notwithstanding Verdict served October 16, 1956, when such motion did not properly lie under Rule 50(b) of the Federal Rules of Civil Procedure and under the facts in this case where the Court had previously given the jury a peremptory instruction to

return a verdict in favor of the defendant, the defendant objects. Objection overruled. The defendant excepts.

To the action of the Court in holding in its Memorandum Decision of December 20, 1956, that the verdict returned October 11, 1956, should be set aside, the defendant objects on the following grounds:

(1) The memorandum decision fails to find that there was no evidence to support the verdict for the defendant, such a finding being required by the unanimous decisions that construe Rule 50(b).

(2) The memorandum decision fails to consider the evidence in the light most favorable to the defendant, and fails to draw all reasonable inferences from the evidence in favor of the defendant, the party against whom the motion for judgment notwithstanding the verdict was made, as required by the unanimous decisions that construe Rule 50(b).

(3) The Court's construction of the contract in question as set out in the memorandum decision is violative of the established rules of construction.

(4) That during the trial, the Court sustained objections against efforts by the defendant to introduce evidence of facts occurring prior to January 23, 1951 (the date of the contract), which the defendant desired to introduce to explain ambiguities in the contract, and ruled that evidence of facts and events occurring prior to the date of execution of the contract were incompetent and could not be considered by the Court or jury, yet the Court in the memorandum decision considers numerous matters prior to such date, such action of the Court during the trial having prevented the defendant from presenting all of the prior and relevant facts

(5) That the memorandum decision, if allowed to stand, and any judgment which might be rendered thereon, would effectively deprive the defendant of his right to trial by jury as guaranteed by the Seventh Amendment of the United States Constitution.

Objection overruled. The defendant excepts.

To the action of the Court in holding in its Memorandum Decision of December 20, 1956, that the judgment entered in the record on October 11, 1956 should be set aside, the defendant objects. Objection overruled. The defendant excepts.

This the 26th day of January, 1957.

WILSON WARLICK
United States District Judge for the
Western District of North Carolina

JUDGMENT ENTERED JANUARY 28, 1957

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

CIVIL No. 936

LEON REINER, and wife, BERTHA REINER,
Plaintiffs,

vs.

ISADORE D. BLUMENTHAL,
Defendant.

JUDGMENT

This action came on for trial before the court and a jury, Hon. Wilson Warlick, presiding, and the issues were duly

tried, and the jury, on October 11, 1956, under the direction of the Court, rendered a verdict that the plaintiffs have and recover nothing of the defendant and pay the court costs to be taxed herein; and the Court also in said judgment dismissed the defendant's counterclaims No. 1, No. 2 and No. 3. To so much of the judgment as adjudicated that the plaintiffs have and recover nothing and pay the costs, the plaintiffs excepted. Within 10 days after said judgment was entered the plaintiffs filed a motion to set aside the verdict and the judgment entered thereon and to enter judgement n.o.v. in accordance with plaintiff's motion for directed verdict during the course of trial that they have and recover of the defendant the amounts due on two promissory notes, together with interest.

After due notice, the motion was heard at Charlotte, N. C., on December 14, 1956.

The Court, having heard the argument of Counsel for both sides, and being fully advised, filed its memorandum decision on December 20, 1956, granting plaintiff's motion, entering a verdict for plaintiffs for $25,000.00, interest and costs, and directing counsel to submit a decree.

It is now ORDERED AND ADJUDGED that the plaintiffs, Leon Reiner and Bertha Reiner, recover of the defendant, Isadore D. Blumenthal, who resides in the City of Charlotte, County of Mecklenburg, State of North Carolina, the sum of $25,000.00, with interest thereon from January 23, 1951, at the rate of 3% per annum until the date of this judgment, $4,510.25, aggregating as of this date the sum of $29,510.25 with interest on the latter sum at the rate of 6% per annum from the date hereof until paid, and their costs of action.

So much of the judgment entered October 11, 1956 as denies the defendant's right to relief on his several counterclaims, is not disturbed by this judgment.

Dated at Charlotte, North Carolina, this 28th day of January, 1957.

WILSON WARLICK
United States District Judge

EXCEPTIONS TO JUDGMENT ENTERED ON JANUARY 28, 1957

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

CIVIL ACTION No. 936

LEON REINER, and wife, BERTHA REINER, *Plaintiffs*, vs. ISADORE D. BLUMENTHAL, *Defendant*.	OBJECTIONS AND EXCEPTIONS TO JUDGMENT ENTERED JANUARY 28, 1957

To the action of the Court setting aside the verdict of the jury returned October 11, 1956, the defendant objects. Objection overruled. The defendant excepts.

To the judgment of the Court setting aside the verdict of the jury returned October 11, 1956, the defendant objects. Objection overruled. The defendant excepts.

To the action of the Court setting aside the judgment entered upon said verdict on October 11, 1956, the defendant objects. Objection overruled. The defendant excepts.

To the judgment of the Court setting aside the judgment entered upon said verdict on October 11, 1956, the defendant objects. Objection overruled. The defendant excepts.

To the action of the Court in holding that the plaintiffs, Leon Reiner and wife, Bertha Reiner, are entitled to recover of the defendant, Isadore D. Blumenthal, the principal sum of Twenty-Five Thousand Dollars ($25,000.00) with interest thereon at the rate of three per cent (3%) per annum from January 23, 1951 until the date of the judgment, January 28, 1957, and with interest on the aggregate amount of said principal sum and interest at three per cent (3%) as aforesaid, at the rate of six per cent (6%) per annum until paid, and their costs of action, the defendant objects. Objection overruled. The defendant excepts.

To the judgment of the Court dated January 28, 1957, which ordered and adjudged that the plaintiffs, Leon Reiner and wife, Bertha Reiner, recover of the defendant, Isadore D. Blumenthal, the principal sum of Twenty-Five Thousand Dollars ($25,000.00) with interest thereon at the rate of three per cent (3%) per annum from January 23, 1951 until the date of the judgment, January 28, 1957, and with interest on the aggregate amount of said principal sum and interest at three per cent (3%) as aforesaid, at the rate of six per cent (6%) per annum until paid, and their costs of action, the defendant objects. Objection overruled. The defendant excepts.

This the 28th day of January, 1957.

/s/ WILSON WARLICK
United States District Judge for the
Western District of North Carolina

CHARGE TO JURY (R.p. 544 to 560)

This action which we began on Monday morning of this week, and this is Thursday, is an action on a contract, being one instituted by Mr. and Mrs. Reiner as plaintiffs against Mr. Blumenthal as defendant, for the prime and sole purpose of recovering on the allegations made in the complaint by the plaintiffs, and which, incidentally, would be required by the law to do; and it was served on the defendant; that they are so entitled to have and recover the principal sum, together with interest of that sort.

The action is on two notes, one in the sum of $10,000.00 and the other in the sum of $15,000.00, both being dated at the time of their execution on January 23, 1951, payable, however, at different times and bearing interest as is provided in the notes.

After the institution of the action and the filing of the complaint which has to do with asserting the execution of the notes, their failure to be paid, and the alleged amount due after demand for such, an answer is filed which undertakes to and does result in as made necessary the filing of a reply; and from the whole of these pleadings—the complaint, the answer and the reply—it would be made to appear that the plaintiffs are residents of New York State, living in that State for some time; that the defendant lives in Charlotte; that the plaintiffs for some time prior to 1948 traded as partners and as such they dealt in surgical and hospital supplies.

That some time at or about 1948 a corporation was formed under the laws of the State of New York, and that the plaintiffs had issued to themselves as the owners of the property of the corporation, the good will, and other assets, outstand-

ing capital stock in the sum of 90 shares, and that some time thereafter—this is a recitation of the factual matters alleged—the defendant bought 45 shares of that stock at a price which is not particularly material but which the parties agreed to have been $190,000.00. And that on the 23rd day of January, 1951, when the contract under which they had thus far done business and had their actions as such, that that amount was then outstanding and due in the sum of $158,000.00 odd dollars. That on that date the parties entered into a new contract. Prior to that time Blumenthal had paid to the plaintiffs on the purchase price of 45 shares of stock the sum of $50,000.00 in cash. That on the 23rd day of January, 1951, as the pleadings would indicate and the recitation thereof would result in my telling you that for one purpose or another which is not material, that the parties entered into a new contract from which stems this particular controversy in which we have been engaged in the hearing thereof since Monday; and that that contract is in writing, and the terms thereof are set out therein.

It will be necessary for me to read to you certain portions of that contract and to read them to you in such a way that you will understand and comprehend them, and being in that frame of mind will understand and appreciate the instructions that I will give you, for in law it is the bounden obligation of the Court to instruct the jury in such way as to clearly present the matter to them.

These are some of the things that are set out after you eliminate the preamble: (Reading:)

> "The parties have heretofore executed an agreement among them dated October 1, 1948, providing, among other things, for the sale by Leon Reiner and Bertha Reiner of forty-five (45) shares of the common stock

of the Corporation to Blumenthal. The sum of $158,-900.00, representing the balance of the purchase price thereof together with accrued interest, remains unpaid.

The parties desire to modify and amend said agreement in accordance with the provisions hereinafter contained.

"NOW, THEREFORE, the parties hereto do hereby mutually agree as follows:"

First, they terminate the existing contract. Secondly, under sub-section (b), they cancel out all of the promissory notes theretofore executed by Blumenthal to them which evidenced the unpaid amounts of the original $190,000.00 then unpaid. They set up that the $158,900.00 which represents the unpaid balance of the purchase price for the 45 shares of stock of the Corporation sold by Leon Reiner and Bertha Reiner to Blumenthal pursuant to the terms of the aforesaid agreement.

Then they enter into this contract, which is the means through which this lawsuit comes about. (Reading:)

"2(c) Simultaneously with the execution of this agreement, Blumenthal will pay to Leon Reiner and Bertha Reiner jointly the sum of $25,000.00."

It is agreed, and there is no objection to my stating to you that that $25,000.00 was paid.

Secondly, or under subsection (b) (reading:)

"(b) Simultaneously with the execution of this agreement, Blumenthal will execute and deliver to Leon Reiner and Bertha Reiner two (2) promissory notes payable to their order with interest at three (3%) per cent per annum as follows: one note in the face amount

of $10,000.00 payable on November 15, 1951 and one note in the face amount of $15,000.00, payable on November 15, 1952. Said notes shall provide that in the event the note first due is not paid on its due date, then the second note shall forthwith become due and payable."

Which has the legal force and effect of saying that in the event the first note is not paid, though the second note may not be due for a year afterwards, it is accelerated for payment and the two thereupon, at the option of the plaintiffs, would become due and payable.

Then we come to sub-section (c): (Reading:)

"(c) In the event of a default in the payment of either of the aforesaid notes . . ."

That is to say, in the event neither of them is paid at the time the first one becomes due and the other one might become accelerated . . . (Continuing to read:)

". . . Leon Reiner and Bertha Reiner jointly shall forthwith be deemed to have purchased the said forty-five shares of stock now owned by Blumenthal in the same manner as if an offer to sell the same had been made by Blumenthal at the book value thereof."

That has the force and effect of meaning, and I so instruct you that in the event the note is not paid and the other is accelerated, that then that gives an option to Mr. and Mrs. Reiner of considering and as such deeming that they have the right, and the contract so provides, to purchase the 45 shares of stock which Blumenthal had bought from them and which was then owned by Blumenthal as if an offer had been made by Blumenthal to sell it to them at such value as the books of the corporation show. There is no dispute but

what on that particular date, and it is stipulated as such, that that 45 shares of stock had a book value of $55,949.70.

Then the next portion of the contract. (Reading:)

"... The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive. Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute any action at law or otherwise to enforce collection of same."

That is the crucial part of the contract, and the question to be determined under proper instructions from the Court is the meaning of that particular wording of the contract.

Plaintiffs say and contend that these two notes totaling $25,000.00 were a special obligation of Blumenthal, and that they were to be paid in any event. The defendant says and contends, among other things, that the notes were obligations of Blumenthal; but that they were nothing more than an obligation which he is supposed to pay, and that along with the remaining $108,900.00, it all constituted an overall debt that was due to the Reiners. I will come back to that later.

Sub-section (d) says this: (Reading:)

"(d) The balance of $108,900.00—

And that is the mathematical balance.

"... with interest at three (3%) per cent from the date hereof shall thereafter be payable only out of dividends paid on the corporate stock now owned by Blumenthal, corporate salaries and bonuses or any other sums, if any, that may become due or payable to Blu-

menthal from the Corporation. Blumenthal does hereby authorize the Corporation to pay over to Leon Reiner and Bertha Reiner jointly all such dividends, salaries and bonuses or any other sums, if any, that may become due and payable to him at any time on or prior to September 1, 1958, to be applied against said balance of $108,900.00 until the same, plus accrued interest at three (3%) per cent, has been fully paid and discharged. If any balance, as aforesaid, remains unpaid on September 1, 1958, Blumenthal does hereby sell, transfer and assign the forty-five (45) shares of the corporate stock now owned by him to Leon Reiner and Bertha Reiner jointly, the purchase price to be the amount of said balance which shall be credited in full payment of said balance and said shares shall be and become the sole property of Leon Reiner and Bertha Reiner without any right of redemption thereto in Blumenthal with the same force and effect as if Blumenthal had offered the same for sale to Leon Reiner and Bertha Reiner at the amount of said balance and Leon Reiner and Bertha Reiner had accepted said offer."

That section of the contract would mean that this balance of $108,900.00, with interest at three per cent, was to be paid following the execution of this contract—and it was executed---out of dividends or bonuses, corporate salaries, and any other sums, if any, that may become due to Blumenthal from the corporation, and that is the L. & B. Reiner, Incorporated; and that is if September 1, 1958 by those bonuses that $108,900.00 had not been paid with interest at three per cent, then such balance as there was shown by an audit of the payments made would be that then the Reiners would be entitled to take over that 45 shares of stock at the balance that had not been paid by Blumenthal from

these dividends or bonuses or other sums due by the corporation.

Then there is an additional section under sub-section (d) with respect to a dissolution of the corporation. Then there is another section 3 to the effect that (reading):

> "3. Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum."

Those paragraphs from the contract I have read are the portions which are involved in this particular controversy, and they constitute the things that we have been undertaking to unravel during the four days from the evidence and the discussion, much of which has been had in your absence, but which, after all, comes back to you under instructions I will give you to determine.

The plaintiffs say and contend that this original stock was sold at arms length and was purchased with full knowledge of all the factors involved; that presumably it did not work out and subsequently and namely on the 23rd day of January, 1951, these parties, then got together and executed a new contract.

The plaintiffs say and contend, first, that there was due to them $158,900.00 by the defendant Blumenthal, and that they agreed if he would pay $25,000.00 in cash and would execute two notes for $25,000.00 in cash, then they would set the remaining balance up at $108,900.00, which was to be paid by him from bonuses, salaries and so forth, and which, if it wasn't paid that way by September 1, 1958, that they would then get the 45 shares of stock that Blumenthal had

contracted they would be entitled to have at that time, if the bonuses and things did not pay it, and that the bonuses have not paid it and that they thereupon own the stock.

They further say and contend that this $25,000.00 in two notes, which were special obligations of the defendant Blumenthal, were to be paid in any event, and that such reservation and prescription was made in the contract, and that in instituting this suit here to recover that they are exercising a right and a privilege which it was contracted they would have under the terms of the contract and from the force and effect thereof.

That, hurriedly stated, would represent a fair recapitulation of the plaintiff's contentions in this matter.

The defendant says and contends that they did enter into this contract by which he admitted that he owed to the plaintiffs $158,900.00; that he agreed to pay $25,000.00 in cash, which he did and which it is admitted was done. That he agreed to and did execute these two notes, one for $10,000.00 and one for $15,000.00, and that they were to be paid as indicated in each of the individual notes—one in November, 1951, and the other in November, 1952.

He says and contends that he defaulted in the payment of the first note, and that obviously that would give to the plaintiffs the right to accelerate the payment of the other.

Then he says and contends that the plaintiffs exercised the right which they had, that they then took over his stock, and it had a value at that time of $55,949.70, and that taking over that stock, by their action, that they, as time had come and gone and circumstances may or may not have changed, that then they made it impossible for him to have paid the $108,900.00 for that they took his stock, and that he could

not get any bonuses, dividends or other things from the corporation, and thereupon, by doing it, that they took it, he says and contends, by his failure to pay these notes, and that he is entitled to have credited and the notes extinguished by full payment of so much thereof as would be represented by that amount in the $55,949.70 which the stock had for its value at that particular time. That is the contention of the defendant.

So he says and contends that these two notes totaling $25,000.00 are both paid; that the plaintiffs got shares of stock for which he paid $190,000.00 at the value of $55,-949.70, and that the $25,000.00 notes should be paid by that and the remained would then be held, as he says and contends, by the plaintiffs for the purposes intended or as a credit against the $108,000.00 he owes.

Now the $108,900.00 is not involved in this controversy at all. This whole controversy is about these two notes.

So we come down to just what did the parties have in mind when they entered into this contract. Naturally, of course, today it is known of all men that you can contract against a thing as you see it today, and if circumstances down through the years or down during the time the contract is continued in existence alter and change the contract, then it becomes the duty of the Court to give some sort of yardstick of measuring what the parties contended to the jury so the jury might rightly construe and determine the results that flow from the contract, and that is what I am trying to do in this particular instance: To lay out to you some medium, some yardstick or some rule by which you can determine the questions which are asked.

There is asked of you two questions which it will become your duty to answer. The first one is: "Did the defendant

execute the two notes one in the sum of $10,000.00 and the other in the sum of $15,000.00, each dated January 23, 1951, as is alleged in the complaint?" I have written down there that is answered, "Yes, by consent", because all parties agree that he did.

The second question is this: "In what amount, if any, is the defendant indebted to the plaintiffs as alleged in the complaint?" In other words, how much does Mr. Blumenthal owe to Mr. and Mrs. Reiner on account of the execution and delivery of these two notes under the facts and circumstances as they have developed in this particular case under the evidence as heard by you as members of the jury, together with the pleadings that are filed.

A contract, members of the jury, is an agreement upon sufficient consideration to do or not to do a particular thing. A contract is an agreement of two or more minds coming together, of two minds or more, upon a thing to be done or done. A contract either expressed or implied executed or executory, for that matter, which results from the concurrence of the minds of two or more persons, and its legal consequences are not dependent upon the impression or the understanding of one alone of the parties to it. It is not what either thinks, but it is what both agreed.

Now, with that construction, when you come to the second issue, I instruct you that the burden of that issue would be upon the defendant. That burden is that he must satisfy you from the evidence and by its greater weight before he would be entitled to have you answer that issue in his favor. By "greater weight" means, not the greater number of witnesses or the testimony with the greater length of time, but the way and manner in which it reacts in your mind, whether it over-balances the weight of the other evidence. If it does, that is the greater weight of the evidence.

So in this question, "What amount, if any, is the defendant indebted to the plaintiffs as alleged in the complaint?", the burden is on the defendant to satisfy you by the greater weight of the evidence, and if he has so satisfied you, then you would answer that question, "Nothing." If he has not so satisfied you, then, nothing else appearing, you would answer it in the sum that you find from the evidence the truth to be as represented in the amount of money actually incorporated into the two notes.

I have given this matter considerable thought. I am of the opinion, at least in my own mind, that my interpretation of this contract is correct. I have had the benefit of especially fine argument from fine legal minds with respect to their thoughts and from studies that they have made and from cases that they have found and interpreted; and I have come to this conclusion. Interpreting this contract on this date, the 11th day of October, I believe, 1956, as against the time when it was made on January 23, 1951, that when the defendant Blumenthal failed in November of 1951 to pay the first note of $10,000.00, that the plaintiffs Reiner and wife, or Mr. and Mrs. Reiner, had the right to accelerate the $15,000.00 note and to look upon both of them as due and owing at that particular time, together with such interest as was due thereon; and that then, under the terms of the contract, that they had the right and they were deemed to have purchased the 45 shares of stock that was then owned by Blumenthal in the same manner as if he, Blumenthal, had offered to sell the same to them at the book value, which, admittedly, was $55,949.70; and that when they did that, as the evidence tends to show they did, and that you will recall that without objection, and really by admission, that the parties plaintiff stated that they looked upon that stock and that though they had not transferred it they held it as such under the terms of that particular section of the contract. That

then, having done that, that they then agreed to pay the sum of $55,949.70 for the taking over of that particular 45 shares of stock; and I instruct you that if you find such facts to be from the evidence and by its greater weight, the burden being on the defendant, that the defendant would then be in law entitled to have his notes credited in full with so much of the $55,000.00 as it took to exonerate him from further liability or responsibility under those two notes, and that having so done that it would be your duty, and I instruct you peremptorily as a matter of law that it is your duty and responsibility to answer that second issue, "Nothing."

So many of you as are agreeable to follow the instructions of the Court and indicate your purpose and intent under these instructions is to answer that second issue nothing, if you will hold up your right hands, I will take the liberty of writing that answer down for you.

(All the jurors except one raise their right hands.)

THE COURT: You did not hold up your right hand, did you?

THE JUROR: No sir.

THE COURT: You do not follow through on the instructions?

(The juror makes some remark which is not heard by the reporter.)

THE COURT: Are all right hands held up?

THE JUROR: No, I didn't have in mind that. There was a question I wanted to ask.

THE COURT: All right, sir. Go ahead.

THE JUROR: It wasn't in relation to the particular question you have now, not directly.

THE COURT: I would not be able to answer it, because I am giving you the peremptory instruction as a matter of law which casts upon my responsibility in interpreting the contract in that way.

So if you as members of the jury are willing to follow through on the instructons given by the Court, indicate that by holding up your right hands, and I will write the answer, "Nothing" for you.

(All members of the jury raise their right hands.)

THE COURT: All right. Then all of you direct the Court under that instruction to answer that issue, "Nothing."

MR. WINSLOW: If the Court please, at the appropriate time I would like to say something to you, and maybe the jury should be out.

THE COURT: I notice, gentlemen of the jury, that you answered the first issue, "Yes, by consent," and the second issue, "Nothing". Is that your verdict?

THE JURY: Yes.

THE COURT: So say you all?

THE JURY: Yes.

RULINGS OF THE COURT

THE COURT: Gentlemen, I have stated that unless something is shown me to the contrary that I would rule and would so instruct the jury that the transactions between these parties dated from the time they entered into that con-

tract. All previous matters thereto are not competent in this case. (R.p. 92)

* * * * * * * * *

That, I think, gentlemen, is just as clear as a bell. If we can find out what that stock was worth on November 15, 1951, as the evidence now shows,—

THE COURT: (Continuing:)—Then, if it had a value, we credit the two notes, and then Mr. Blumenthal will owe the difference with interest as the notes recall. If it paid it up in full, then, of course, the notes would be paid and cancelled as of the sale of the stock to Mr. and Mrs. Reiner. Gentlemen, unless you show me where I am wrong, I think I have interpreted the lawsuit and gotten it behind us.
(R.p. 159)

* * * * * * * * *

THE COURT: I do not think, Mr. Helms, frankly, that either of those propositions are before us for determination at this time. I think the fraud you allege, if there was any—and I am not saying whether there was or whether there was not—that that was precluded and abrogated by the execution of the new contract in 1951; and that the management of the corporation is a matter about which we are not concerned, because these are suits on the notes under the contract.

MR. HELMS: Not the management, your Honor, but the question of whether there was—

THE COURT: Properly set up, yes sir.

MR. HELMS: Whether there was a corporation. In this connection your Honor will recall that we set up three defenses in our answer. Mind you, this answer was based upon

our discovery procedures in New York. Our first defense was that of fraud, at the beginning and continuing—

THE COURT: We have got that behind us.

MR. HELMS: Not only up to but during and continuing after the January 23, 1951 contract; and the other was the invalidity of the corporation. And I would like to very briefly just read certain excerpts from these two decisions.

MR. COOLEY: If your Honor please, could I interrupt? I thought your Honor had ruled on this very thing. Mr. Helms is going on and on and on.

THE COURT: I agree on that. I do not think the validity of the corporation has anything to do with it at all, because these parties bought these shares of stock.

MR. HELMS: I am talking about now, your Honor, our position, which is one of the material points in the case from our standpoint.

THE COURT: I will rule against you on that, Mr. Helms, because we have gotten past that now. Right or wrong, I have certainly done that. We are down to the point to whether or not these parties are entitled to recover against Mr. Blumenthal on these notes. (R.p. 269-270)

* * * * * * * * * *

I was told by counsel for the defendant that it was desired that evidence be offered having to do with the matter of fraud purportedly alleged in the answer as having come about from the original sale of the stock and other factors that might be involved at or about the year 1948 and for time subsequent to that and previous to the 23rd of January, 1951. In view of the fact that there has been offered in evi-

dence and was read from the reply in your presence on yesterday, a purported agreement, which evidently all parties at issue state is an agreement entered into between these parties—the plaintiff and his wife and the defendant—on January 23, 1951. I am of the opinion and so hold and in so holding announced to parties that I would not permit evidence to be heard by you with respect to fraud prior to that time, on the theory and the doctrine that is universally understood and appreciated in law that when parties enter into a written contract everything thereafter, in the absence of fraud in this particular contract, or in that particular contract, is merged into the contract itself.

So whatever, if anything, that took place prior to January 23, 1951, having to do with alleged fraud is withheld from you on the objection made by the plaintiffs. (R.p. 272-273)

* * * * * * * * *

THE COURT: And then I previously ruled, whether or not in your presence but now do so that you may have that information, that anything having to do with the organization of the corporation or its status previous to the 23rd of January, 1951, when this contract from which these notes allegedly emanate was entered into, is withheld; and in view of the objection by counsel for the plaintiffs and will not be submitted to you as evidence in the case. To which you object. (R.p. 272-274)

MR. HELMS: To which we object and except.

* * * * * * * * *

THE COURT: (Continuing to read:)

"The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive, Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute

any action at law or otherwise to enforce collection of same."

Undoubtedly, a proper construction of that would be that if the book value was less than the value of the notes, that would give them the right to institute a suit to recover the deficiency. (R.p. 187)

* * * * * * * * *

THE COURT: That would mean that nothing else appearing, that would thus far mean that Blumenthal owes these parties $25,000.00 plus interest, and that he has with which to pay that $55,949.70; and that nothing else appearing up until that time then, the plaintiffs, of course, would owe him such difference as there is between $25,000.00 and $50,000.00.

MR. HELMS: That's right. (R.p. 189)

* * * * * * * * *

THE COURT: It would be my interpretation, nothing else appearing as a matter of law, that if and when they took over those shares of stock, exercising their right which the contract made provision for on the 15th of November, 1952, that that automatically set the yardstick for payment as being $25,000.00 and interest to be depreciated from the value of the stock; and that when that was done, that wiped the whole thing out, lock, stock and barrel. Because, in doing that, they took the stock, which made it impossible for him to pay only out of dividends or to receive bonuses or salaries, and if it was found insufficient that then he was to convey the stock, which he could not do, because they already had it.

So I will hold, and I will so instruct the jury on the evidence thus far at the proper time, that these parties owe

Blumenthal $55,949.70 against which he owes them $25,000.00 and interest, and that he would be entitled to have and recover of the plaintiffs on his counterclaim such difference as there was between the $25,000.00 and the $55,000.00. (R.p. 190)

* * * * * * * * *

EXCERPTS FROM DEPOSITION OF LEON REINER

"Q Now, since L. & B. Reiner, Incorporated, was organizer, has it ever declared or paid a dividend on its outstanding capital stock?"

"A No."

"Q During the time that the corporation has been organized and in operation, has it ever paid any salary or other remuneration to the defendant, I. D. Blumenthal?"

MR. COOLEY: Objection to that.

"A No." (R.p. 108)

* * * * * * * * *

"Q During the time that the corporation, L. & B. Reiner, Incorporated, has been in existence, has it ever paid anything to I. D. Blumenthal?"

"A No." (R.p. 109)

* * * * * * * * *

"Q I believe in your complaint you allege that the $10,000 note sued upon was due on November 15, 1951, and you further allege that it was not paid on its due date.

"A That's right.

"Q Did you and Mrs. Reiner on that date take over the ownership of the 45 shares of stock issued to and endorsed by I. D. Blumenthal?

"A I don't know what you mean by 'taking over'.

"Q Did you treat it as a default and did you exercise any rights—

"A My rights in accordance with the agreement.

"Q Now, what rights did you exercise?

"A Retaining the stock.

"Q Well, now, before November 15, 1951, you and Mrs. Reiner held the stock, you say, as collateral?

"A That's right.

"Q And then upon the failure of Mr. Blumenthal to pay the $10,000 note, on November 15, 1951, you exercised your rights under the contract, and since then you have held,—you and Mrs. Reiner have held the 45 shares as owners and not as lenders, isn't that right?

"A As our rights are outlined in the contract.

"Q What I mean is you no longer hold it as collateral security, but, since then, have held it as owners, you say?

"A There has nothing been physically done in the stock—it is still in the same place as before, namely, in my vault.

"Q But I understand you to say you exercised your rights under the contract, upon the default?

"A That's right."

"Q Mr. Reiner, you referred to 45 shares of the so-called Blumenthal stock as having reverted to Mrs. Reiner and you. As of what date did the reversion take place?

"A In accordance with the agreement—in accordance with our contract the reversion took place upon his default in the payments of the first note.

"Q What was that date?

"A I believe—I don't remember the exact date, but I think it is November 15, 1951.

"Q Since that date you have regarded this stock, these 45 shares, as being owned by Mrs. Reiner and by you?

"A That's right.

"Q In what proportions?

"A 30 to Mrs. Reiner, and 15 to me." (R.p. 126)

* * * * * * * * *

"Q From your connection with the business, and from your knowledge of it, hasn't the volume of business of L. & B. Reiner, Incorporated, been steadily decreasing since 1948?

"A That's right.

MR. WINSLOW: We object.

THE COURT: Overruled.

"Q Have its profits likewise been steadily decreasing?

"A Yes sir. (R.p. 129)

* * * * * * * * *

"Q You testified that there were no meetings of the Board of Directors of L. & B. Reiner, Incorporated, since January 1, 1948, is that correct?

"A That's right.

"Q Now, can you tell us why there were no such meetings?

"A There was no necessity for them.

"Q Who were the directors of the corporation?

"A Mrs. Reiner and myself."

"Q One other question I want to ask you, Mr. Reiner. Prior to November 15, 1951, Mr. Blumenthal paid to Mrs. Reiner and to you a total of $75,000 on the 45 shares of stock transaction, did he not?

"A He paid $50,000 originally on the first contract, which left a sizable obligation.

"Q I just want to know the amount.

"A The other $25,000 was paid—

"Q I am just asking you, Mr. Reiner, what the total was that he paid you, not the time.

"A The total that he paid was $75,000." (R.p. 131)

* * * * * * * * *

"Q Mr. Reiner both treated these 45 shares of stock in L. & B. Reiner, Incorporated, that were endorsed in blank by Mr. Blumenthal, as being the stock of you and Mr. Reiner?

"A After he defaulted,—after he did not pay, that was the last payment.

"Q That was on November 15, 1951?

"A You can look through the records—

"Q Do you know what was done with the stock?

"A He submitted it for payment. (R.p. 227)

* * * * * * * * *

EXCERPT FROM DEPOSITION OF BERTHA REINER

"A It became ours after he defaulted. I am confused. I don't get it right because of the date.

"Q What did you and Mr. Reiner do with these 45 shares of stock in L. & B. Reiner, Incorporated, after the default?

"A Well, I considered that part of it was mine.

"Q How much of it?

"A Well, how much of it—let's see now—thirty would be mine, and fifteen Mr. Reiner's. (R.p. 227)

* * * * * * * * *

STIPULATION OF BOOK VALUE

THE COURT: (To the jury:) Members of the jury, it was stipulated during your absence while we were discussing the force and effect of the contract and undertaking to determine in our minds the legality thereof and the bearing it would have on the evidence offered and the force and effect of the contract itself. It was stipulated that on the 16th of November, 1951—and if I am in error about this, you gentlemen correct me—that the total book value of the corporation was $111,899.40, and that the defendant Blumenthal, owning 45 shares, or one-half of the original outstanding 90 shares of capital stock of the corporation, that his 45 shares had the value of one-half thereof, or $55,949.70. That is right, is it not? (R.p. 267)

* * * * * * * * *

TESTIMONY OF I. D. BLUMENTHAL

Q Mr. Blumenthal, I hand you Plaintiff's Exhibit No. 3, agreement dated 23rd of January, 1951, between Leon Reiner, Bertha Reiner, L. & B. Reiner, Incorporated and Isadore D. Blumenthal, and ask you to examine the last page of that exhibit and the last signature on the page and ask you to state if that is your signature?

A Yes sir.

Q Will you just state under what circumstances you signed that agreement, Mr. Blumenthal? Where and under what circumstances?

A This agreement was a second agreement that we made, because the first agreement was very harsh agreement, and this was worked out. I had—I went to New York about a dozen times or more to try to help Reiner in this business. As a matter of fact, just prior, just before we made this agreement here, we were discussing a bunch of notes that he got from me telling me that he wasn't going to collect those notes. I paid him $50,000.00, and the agreement was between us—

A I paid him $50,000.00, and he agreed that he wouldn't collect the notes.

MR. COOLEY: Objection.

THE COURT: Was that the notes—

THE WITNESS: In the original agreement.

THE COURT: That would not be competent, because that is merged into this one.

MR. HELMS: What I am asking him, your Honor, is about his negotiations in connection with this contract.

THE COURT: Yes sir.

A This one, building up to this one—He didn't ask me to pay those notes for about a year and a half after I gave him the notes; so I wanted to get together with him to work out and get those notes back. I went down to Florida and I met him—I thought we would get in the presence of the

President of this metabolism machine, who was a good friend of his and I knew him very slightly—No, I don't believe I had ever met him, but I knew of him. And I thought if we got down there we could straighten out our difficulties. And while we were down there, he relented on these notes and went back to his original agreement that he wouldn't call for payment on the notes. Then we went before Dr. Jones, the President of the Jones Metabolism Company, and Leon and I shook hands on a deal that he wouldn't call for payment of those notes, the original deal. I was supposed to go to New York to make this new agreement, which this is the result of; and before I got to New York, he called me on the phone and reneged on that agreement that we made in Florida and his original agreement, not calling for the payment of those notes, because he had gotten $50,000.00 from me. When I got up there—I was there about a week straightening out other matters in the business there. There was a lot of friction with the salesmen, with customers. I was up there about a week, and we were discussing this new contract—this one. Not this one, but a new contract following up our conversation in Florida and our agreement in Florida. I was sitting in his office when one of the young ladies came in and said—

MR. COOLEY: Objection.

A (Continuing)—"Mr. Reiner—

MR. HELMS: Don't tell me what the young lady said.

THE COURT: That would not be competent.

Q Tell what happened and what you said to Mr. Reiner and what he said to you.

A I was trying to get back to get him to stick to his agreement we made in Florida and where we shook hands in

front of Dr. Jones. So we were talking for another half hour, and when we came out of his office into the showroom, there was a young lady sitting there. She walked up to me and she said—

MR. COOLEY: Objection.

THE COURT: That would not be competent.

Q Who was she?

A She had a summons.

Q Was she a lady sheriff or a deputy?

A I don't know what you call her, but she had a summons.

THE COURT: In any event, a summons was served on you; is that right?

THE WITNESS: That's right. That's right.

THE COURT: Process server they call them up there, I believe.

Q That was the summons in the case that was brought against you in the New York court by Leon Reiner and Bertha Reiner that has been referred to here?

A That's right. (R.p. 279-282)

* * * * * * * * *

Q Was anything served on you in either of those suits in New York excepting just the summons in each case?

A No. Just that summons that that woman gave me in his place, which was about a week before—I believe that time was extended on that summons, and I didn't have any other papers served on me. (R.p. 285)

* * * * * * * * *

Q Did you see him in New York yourself? When you went back the second time?

A Yes sir, I saw him about half a dozen times. I was there about a week or ten days to make up this contract.

Q Where did you see him most of those times, if you recall?

A I recall distinctly all of the times was right in his office, in his showroom. Right in his office at 139 East 23rd Street. And I pointed out to him that we had been friends for 40 years. And I pointed out to him that I gave him $50,000.00 "What do you want now? You told me you wouldn't call for those notes." I didn't want to give him the notes originally, to start with. I didn't think it was necessary, but he says he had a lawyer there, a brother-in-law—

Q Is that Mr. Matzkin?

A Mr. Matzkin sitting over here that married Mrs. Reiner's sister; and that they insisted on notes, and the notes had to have a time limit and all this. And I took him on his word because, as I say, as kids we were friends. We were friends all the way through this, and I didn't think that he would call for payment.

MR. COOLEY: Objection and move to strike.

THE COURT: Sustained.

Q Just tell what transpired and what he said to you.

A So I said, "Listen, Leon. I gave you $50,000.00. What more do you want? I have tried to help you. I have been up here a dozen times or more—left my business, my home, my family—and all these twelve times that I have come to New York I have never asked you for a penny expenses. That lasted from two days to two weeks. Hotel bills, eats, all at

my own expense. I never got a penny out of it." I said, "What do you want? Let's make a new agreement and be fair about it, because there is nothing fair about this other agreement." I said, "I have never had any of the stock," and finally he must have relented or something, because he—

Q Don't tell what he must have done. Just go ahead and tell what he did and said and what you did and said.

A Finally he agreed. He wanted another $50,000.00.

MR. WINSLOW: Motion to strike.

THE COURT: Overruled.

MR. HELMS: Go ahead.

A He wanted another $50,000.00 cash; and so I came back here and I couldn't raise $50,000.00. It doesn't make any difference what position you are in sometimes, $50,000.00 is a lot of money.

MR. COOLEY: Objection.

MR. WINSLOW: Move to strike that.

THE COURT: Sustained.

A All I could raise was $25,000.00, so I went back to him, pleading with him that all I could raise was $25,000.00. He said, "Well, give me two notes, one payable in a year for $10,000 and one payable in two years—not quite two years, because this was in January and the first note was due in November." He says, "I will work in the business and I will make it pay like it did before, and you won't even have to pay these notes," he says. "It will come out of profits."

MR. WINSLOW: I move to strike that.

THE WITNESS: That's what he told me.

THE COURT: Overruled. Go ahead, sir . (To the witness:) Did you subsequently execute your contract, then?

THE WITNESS: Then I went back to Mr. Epstein and told Mr. Epstein what I had worked out: That I would pay him $25,000.00 cash and these two notes for $10,000.00 and $15,000.00; that I would get my stock after I paid the $50,000.00; and the rest of it, the $108,000.00, would come out of profits and I wouldn't be responsible for it, and I would get my notes back, but I would have to give him these two notes for a total of $25,000.00. (R.p. 286-289)

* * * * * * * * *

Q In connection with that contract, did you pay any cash, and if so, to whom did you pay it at the time?

A Well, the $25,000.00 cash was paid at the signing of this contract, and the two notes were given at the signing of this contract.

Q Who paid the $25,000.00, and to whom was it paid?

A I paid the $25,000.00, and it was paid to Leon and Bertha Reiner.

Q How much did that make altogether that you had paid to Mr. and Mrs. Reiner on this stock deal?

A That made a total of $75,000.00, plus the two notes, would make a total of $100,000.00. (R.p. 290)

* * * * * * * * *

Q What was your agreement about the payment of those two notes that I have shown you, and what, if any, agreement was there about the stock in connection with the payment of these two notes?

MR. WINSLOW: We object.

THE COURT: Sustained.

THE COURT: Sustained. That would not be competent, gentlemen. I hold everything is merged into the paper-writing. (R.p. 293)

THE COURT: If I understand it, correctly, then, the 45 shares of stock which you purchased, that certificate for those was signed over by you and you never at any time thereafter had that certificate of stock to show for your money?

THE WITNESS: No sir.

THE COURT: All right.

THE WITNESS: I was supposed to get that certificate after I paid the notes.

MR. COOLEY: Objection. The contract sets out the provisions. Move to strike.

THE COURT: Objection sustained.

(To the witness:) This money, if I get it correctly, was for the purchase of the stock in this corporation?

THE WITNESS: The $100,000.00?

THE COURT: Yes sir.

Q (By Mr. Helms:) Mr. Blumenthal, I hand you what purports to be a certificate of stock, Certificate No. 9, for 45 shares of L. & B. Reiner, Incorporated, dated the 23rd day of January, 1951, and ask you to examine the reverse side of that and state whether that is your signature.

A Yes sir, that is.

Q When and under what circumstances did you see this particular certificate?

A At the closing of this transaction, this contract here.

Q Did you sign this in connection with the consummation of that transaction? Did you endorse this certificate?

A Yes sir.

Q Who did you deliver it to?

A My attorney, Mr. Epstein.

Q Did you ever have it in your possession except during that time?

A That is the only time I had it.

MR. HELMS: (To the Clerk:) Mark that for identification.

(DEFENDANT'S EXHIBIT A is marked for IDENTIFICATION.)

MR. HELMS: Will your Honor indulge us just a minute? This exhibit has something we had not seen before.

(To plaintiff's counsel:) Do you gentlemen have the original Certificate No. 5?

MR. COOLEY: Stock certificate?

MR. HELMS: Yes sir.

MR. COOLEY: It is fastened in the stock book.

Q (By Mr. Helms:) Mr. Blumenthal, I show you Certificate No. 5 for 15 shares L. & B. Reiner, Incorporated, issued to Leon Reiner under date of October 1, 1948, and ask you to examine that certificate and also to examine the reverse side of the certificate.

(The witness examines paper as requested.)

Q Is that your signature?

A This is my signature, but I don't remember any stamps being on it, and I don't remember this being clipped on there. This is my signature. It looks like it has been clipped on, and I know there were no stamps on it. I am sure about that.

MR. COOLEY: What is the number of that certificate, Mr. Helms?

MR. HELMS: No. 5.

Q That was, I believe, for 15 shares?

A May I—

Q And you signed the endorsement of that on October 1, 1948, in the presence of Mr. M. B. Matzkin, didn't you?

A That's my signature, and I don't know that he—I don't remember.

Q All right.

MR. HELMS: We ask that that be marked for identification as Defendant's Exhibit B.

(DEFENDANT'S EXHIBIT B is marked for IDENTIFICATION.)

MR. WINSLOW: What is your number?

MR. HELMS: Exhibit B, isn't it?

THE CLERK: Yes sir.

MR. WINSLOW: Exhibit B?

MR. HELMS: Yes sir. Exhibit B for identification.

THE COURT: What is your next, please sir?

Q (By Mr. Helms:) Now, Mr. Blumenthal, I show you Certificate No. 7 for 30 shares issued to Bertha Reiner by L. & B. Reiner, Incorporated, under date of October 1, 1948, and ask you to examine the reverse side of that and state whether that is your signature.

A Yes sir, that is my signature. Again, I don't remember the stamps, and I don't remember all that typed on there.

Q All right, sir. That was signed in the presence of the same witness, Mr. M. B. Matzkin?

A His name is down there, Mr. Helms, but I don't remember signing it in his presence.

MR. HELMS: All right. I ask that that be marked for identification as Defendant's Exhibit C.

(DEFENDANT'S EXHIBIT C is marked for IDENTIFICATION.)

THE COURT: All right, Sir. What next?

Q The date of the endorsement on each of those certificates, one for 15 and the other for 30 shares, was October 1, 1948, and the certificate for 45 shares issued to you on January 23, 1951. Did you ever receive or ever see any certificate of stock issued in your name in L. & B. Reiner, Incorporated, except this Certificate 9 for 45 shares? That was ever issued in your name?

A That is about the only one.

Q Other than the two that you endorsed?

A They were not issued to me.

Q That's right. That's what I asked. This is the only one, so far as you know, that was ever issued in your name?

A Yes sir.

Q Have you ever received any dividends on this stock?

MESSRS. COOLEY AND WINSLOW: Objection.

A No sir.

THE COURT: Overruled. He said he had not.

Q Have you ever been paid anything for these 45 shares of stock?

MR. WINSLOW: Objection.

A No sir. Not a penny.

THE COURT: I think that is not competent. I will sustain that.

MR. HELMS: I think it is competent, your Honor, on the question of these notes. That is what I was leading up to. Perhaps I should ask it this way, your Honor:

Q (By Mr. Helms:) Since January 23, 1951, the date of the execution of the contract, Plaintiff's Exhibit 3, the date of the issue to you of the Certificate No. 9 for 45 shares of stock, and the date of the execution of the two notes, Plaintiff's Exhibits 1 and 2, have you received any dividends on this 45 shares of stock from L. & B. Reiner, Incorporated?

MR. WINSLOW: Objection.

A No sir.

Q Now then, your Honor, I wanted to ask this question: At any time since January 23, 1951, has Mr. Reiner paid you anything on or for this 45 shares of stock?

MR. WINSLOW: Objection.

THE COURT: Overruled.

A. No sir. Not a penny.

Q Since January 23, 1951, has Mrs. Bertha Reiner paid you anything on or for these 45 shares of stock?

A. No sir.

Q Since January 23, 1951, has this certificate at any time been in your possession except when you endorsed it and when I handed it to you here in court?

MR. WINSLOW: Objection. Immaterial.

A Never had it.

THE COURT: He says he never had it.

Q Mr. Blumenthal, when the note, Plaintiffs' Exhibit No. 1, dated January 23, 1951, in the amount of $10,000.00 became due on November 15, 1951, did you pay that note or any part of it?

A No sir.

Q In cash?

A No sir.

Q Did you ever pay any interest on it?

A No sir.

Q Have you ever paid anything in cash on the note, Plaintiff's Exhibit No. 2, in the amount of $15,000.00 dated January 23, 1951?

A No sir.

Q Since January 23, 1951, has L. & B. Reiner Company paid you any salary?

A No sir. Never have paid any before or since that time.

Q Since January 23, 1951, has L. & B. Reiner, Incorporated, paid you any expenses, dividends, or anything else in the way of money?

A No sir.

Q After January 23, 1951, did you ever attend any meeting of stockholders of L. & B. Reiner, Incorporated?

THE WITNESS: No sir.

Q Since January 23, 1951, have you attended any meeting of directors of L. & B. Reiner, Incorporated?

A No sir.

Q Have you at any time attended any meeting of stockholders or directors of L. & B. Reiner, Incorporated, at which you were elected as an officer?

MESSRS. COOLEY AND WINSLOW: Objection.

A No sir. Never attended—

MR. COOLEY: No sir. (R.p. 297-305)

* * * * * * * *

BY MR. HELMS:

Q Mr. Blumenthal, when and how did you first learn that you had never been elected a director of the L. & B. Reiner, Incorporated?

MR. WINSLOW: Objection.

THE COURT: Overruled, if he knows.

A The first time I learned about that was after you and Mr. Weinstein returned from New York and took the depositions up there.

Q That's the depositions, portions of which have been read here?

A That's right.

Q That was after this present suit was instituted?

A Yes sir. Yes sir.

Q When did you first learn that you had never been elected as an officer of L. & B. Reiner, Incorporated?

MR. COOLEY: We object to that, if the Court pleases.

THE COURT: I imagine it was at the same time, was it not?

THE WITNESS: Yes sir.

THE COURT: All right. Overruled.

Q (By Mr. Helms:) When did you first learn, Mr. Blumenthal, that is, subsequent to January 23, 1951, when did you first learn, if you did learn, that L. & B. Reiner, Incorporated, never had but two stockholders?

MESSRS. COOLEY AND WINSLOW: Objection.

THE COURT: I do not see the materiality of that, gentlemen. I have ruled on that.

MR. WINSLOW: You threw out the invalidity of the corporation yesterday and the day before, too.

THE COURT: Yes sir.

MR. HELMS: Yes sir, but this goes to the second contract, and I am not asking him anything prior to that, your Honor.

THE COURT: I do not think it is material, but in any event, his statement, I assume, that that was when you made the examination of the records up there after taking the depositions?

THE WITNESS: Yes sir.

THE COURT: All right, sir. Now, let us go on to something else.

MR. HELMS: And then, one other question along the same line, your Honor:

Q When did you first learn, Mr. Blumenthal, that L. & B. Reiner, Incorporated, never had had but two directors?

MESSRS. COOLEY AND WINSLOW: Objection.

THE COURT: Overruled. I will let that go in.

A At the same time, when I read the depositions.

(R.p. 312-314)

* * * * * * * * *

RE-CROSS EXAMINATION

Q And you knew you were obligating yourself to pay the sum of $25,000.00 to the plaintiffs.

A I paid those notes. (R.p. 332)

* * * * * * * * *

Q You said a moment ago that you contended that you obtained nothing of value and that there was a total lack of consideration.

A Not one penny.

Q (Continuing:)—To support the contracts between you and the Reiners. That is your contention?

A Yes sir. (R.p. 353)

* * * * * * * * *

Q But you don't deny that you did have these two certificates in your possession totaling 45 shares of stock in the Reiner Company?

A I never had them in my possession.

Q You had them in your hands long enough to endorse them to them, didn't you?

A This is a piece of paper that was clipped on there. I never had the stock.

Q You signed this transfer, didn't you?

A Yes sir. The transfer. (R.p. 356)

* * * * * * * * *

Q Can you explain to the jury why you first said you never had received any of this stock, and then you admit you had it in your hands long enough to transfer it?

A I say I signed the piece of paper that is clipped to a piece of stock, and I never saw the stock; I never had it in my hands.

Q But you signed the transfer of the stock—

A The stock is no good, invalid, and of no value—

MR. COOLEY: Move to strike.

THE COURT: Sustained as to the last statement.

A The whole—

Q You certainly had that one in your hands, didn't you?

A I had this one here. I put my name on there.

Q And now you admit on cross-examination—

A This is in 1951.

Q That's right.

A The second go round.

Q Well.

A But that stock is no good either.

MR. COOLEY: Move to strike that.

THE COURT: That is his interpretation.

A That's my interpretation. There is no value to—

Q I am not asking for your interpretation.

THE COURT: I will sustain the objection to that. (To the witness:) He is asking you whether or not you signed it. He said he had it in his hands long enough to sign it.

Q You don't contend that the book value of the stock in the Reiner Corporation was worth any more than $55,000.00 or $56,000.00 at the time you defaulted on your notes, do you?

A I paid three times that much for it.

Q Never mind that. Do you contend that it was worth more or less?

A I agreed to take book value.

Q All right.

A (Continuing:) $59,000.00, and he agreed to pay me, and with that $59,000.00 I paid those $25,000.00 notes.

MR. COOLEY: Move to strike.

THE COURT: Overruled, if that is his interpretation. Overruled, if that it what he contends he did. I will instruct the jury what the contract was, or if it is ambiguous I will leave it to the jury to construe, but he says that is his understanding of the matter, and he would be entitled to state that.

MR. COOLEY: To state his understanding of the written contract?

THE COURT: Yes sir.

THE WITNESS: I made the deal with Mr. Reiner. I know what I made. (R.p. 357-359)

* * * * * * * * *

A The book value of the stock was around $59,000.00.

Q All right.

A For my stock.

Q But you had deposited as collateral with the Reiners, had signed the certificates in blank, hadn't you?

A That's right. Deposited that as collateral for the two notes.

MR. COOLEY: Move to strike that out.

THE COURT: Overruled, if that is what he—

THE WITNESS: That is my impression. I signed it as collateral for the two notes.

MR. COOLEY: If the Court pleases, he signed a written contract, which speaks very clearly.

THE COURT: I am going to tell the jury what the force and effect of the written contract is. If it is ambiguous under the North Carolina laws, I will let the jury determine the relative values.

THE WITNESS: Mr. Cooley, I signed that. I made that deal. You didn't make the deal. I know what I did.
(R.p. 359-360)

* * * * * * * * *

A I sent two of my auditors to check those books because I knew there was something wrong up there, and something fishy.

Q What did you find wrong up there, and fishy? Go ahead and tell us. Name one thing you found fishy and wrong.

THE WITNESS: I went to New York and I talked to Mr. Jacobson about this matter—the man sitting right there. He has been his auditor ever since Reiner has been in business. Jacobson says to me, "The company made $5,000.00, and I want to show in the books that the company made no money." I said, "What kind of business is that? Why do you want to do that? He says, "We don't have any money to pay taxes. I said, "We don't do business like that down home. I don't know what kind of business that is that you don't have any money to pay taxes and so you are going to make an entry on the books to show no profits." I said, "I am going to tell you: I don't know how you have been running your books up here before I got into this business, but from now on I am telling you and I am putting you all on notice that you make the proper entries in the company's books."

THE COURT: All right, sir.

MR. COOLEY: I move to strike that out, if the Court pleases, as not being responsive to the question, as involving hearsay evidence, statements made by a man who is not a party to the action and who has not been on the stand as a witness.

THE COURT: Is this man Jacobson an auditor?

THE WITNESS: Yes sir.

THE COURT: In view of the question asked on cross-examination, I am of the opinion that the answer is proper.

(R.p. 365-366)

* * * * * * * * *

Q You said you had paid $100,000.00 on the stock to the Reiners?

A That's right.

Q That $100,000.00 would include the $25,000.00 we are now suing for, wouldn't it?

A That's right.

Q So you have $100,000.00 in it when you pay the $25,000.00 on the notes?

A When I signed the notes, it's the same as—

Q As cash?

A As cash. That's right.

Q So—

A I figured. Let me get through now. I said I had $100,000.00 invested. I was obligated for $100,000.00. And I knew that the agreement—and I made the agreement myself with Reiner—I said, "You are going to pay me three times the book value for the stock, or just the book value for the stock," and he wouldn't budge one cent. I paid him three times this much for the stock as the book value, and in the agreement all he would consent to is book value. As a matter of fact, further in that same agreement is provided for a case of death. If I died, my estate got one-half of the book value for my stock; but his estate got the whole amount.

Q That was in the contract?

A That is in the contract.

Q And you signed it?

A Yes.

Q And you knew what you were doing when you signed it?

A Yes. I couldn't help myself.

Q You said a moment ago that you—

A Wait a minute. I'm not through. I said I had $100,000.00 invested. In June I saw that I couldn't do nothing with him as much as I tried. Look at all those letters that you brought up here. I didn't know I did so much work over there. Didn't know I had put in that much time. I made a dozen or eighteen trips up there, at my own expense. The company never paid me one red penny for the hotel bills, for transportation, for no expenses whatsoever.

At that time I realized that there wasn't any use to go any further, and I began talking to him on the phone to give me my money and let me out now. I told him that three months, six months, many times, before these notes became due. And I took it that those notes would be paid and he would pay me for my stock $59,000.00, the book value, and we would just call it a day.

Q Let me ask you this question: You made a statement to the jury a moment ago that you had $100,000.00 invested in this business and that you regarded these $25,000.00 notes—the two notes totaling $25,000.00—the same as cash.

A That's right.

Q But you never paid a dime on the notes nor on the interest on the notes?

A The notes applied against my stock, because the stock was worth twice the amount of the notes.

Q What became of the $108,000.00 that you left remaining due on the stock that you never paid?

A I didn't give that in notes, because that was supposed to come out of profits.

Q At the time that you signed this contract on the 23rd of January, 1951, you were relieved of personal liability for the $108,000.00 balance due on the stock, weren't you?

A That's right. That was to come out of the profits.

(R.p. 381-384)

* * * * * * * * *

Q I ask you if you have paid a single dollar on that $108,000.00 other than the credit given by the surrender of the stock at its book value?

MR. HELMS: You can answer that yes or no.

A Will you repeat that question, please sir?

MR. WINSLOW: Have the reporter read the question.

(The pending question is read.)

A The answer to the question is no, but I want to explain.

Q All right.

A This $108,000.00 was supposed to be paid by dividends, bonuses and profits and what not out of funds of the corporation in future years. Now. This $108,000.00, after making this contract here with Reiner, we got back to our original point where the notes were not supposed to be collected. I wasn't supposed to pay any money on that $108,000.00 That was a separate thing. If I didn't go through and pay these two notes and elected to let these two notes apply against my 45 shares of stock by June ,1951—that was when my father died, and I was worried, and I had too much worry—and I didn't want to go further with this. I saw there was no use to go any further, and I was content to take my stock, let him pay me book value for my stock, take

out the $25,000.00, give me the difference, and I would take my loss of our 40 or 50 thousand dollars and wash my hands of it and call it a bad deal.

MR. COOLEY: I move to strike that all out, if your Honor please.

THE COURT: Motion to strike. Motion allowed. That would not be responsive to his question. (R.p. 392-393)

* * * * * * * * *

RE-DIRECT EXAMINATION

BY MR. HELMS:

Q Mr. Blumenthal, Mr. Cooley, on cross-examination, asked you this question: "Q. What did you find wrong and fishy? Go ahead and tell us. Name one thing you found fishy and wrong?" Will you go ahead and state what you found fishy and wrong after January 23, 1951.

MR. COOLEY: If the Court please, I thought the witness answered the question.

THE COURT: He answered that. Objection sustained.

MR. HELMS: The difficulty, though, your Honor, was that Mr. Cooley then undertook to limit his answer to what he found in the books, and that was not his question.

THE COURT: Objection sustained. It is a question which he has answered and by which he is bound. (R.p. 402)

* * * * * * * * *

EXAMINATION OF LEON REINER

Q You and Mrs. Reiner have the same amount of stock, the same stock now that you originally sold to Mr. Blumenthal, don't you?

THE COURT: (Continuing:)—The 45 shares that you all sold to Blumenthal originally, you all have that back now and you have the same outstanding 90 shares?

THE WITNESS: Yes sir.

MR. HELMS: All right. (R.p. 471)

* * * * * * * * *

Q Mr. Reiner, you and Mrs. Reiner have never paid to Mr. Blumenthal or paid back to him any part of the money that he paid you for this stock, have you?

MR. WINSLOW: Objection.

THE COURT: Sustained. There is no contention that they have, Mr. Helms.

MR. HELMS: All right, Sir.

Q Well, the net result of all of these transactions, Mr. Reiner, is that you have the same stock that you had originally, and you have $75,000.00 of cash that Mr. Blumenthal paid you?

MESSRS. COOLEY AND WINSLOW: Objection.

THE COURT: Sustained. That is argumentative, gentlemen. That is a summation on the evidence. We will hear more about that in the argument, I am sure. Is that all?

(R.p. 473)

* * * * * * * * *

Q You have not applied any part of the book value of the Blumenthal stock which is stipulated as being $55,949.70 as of November 15, 1951—You have not paid any part of that $55,949.70 to Mr. Blumenthal in cash, have you?

THE COURT: Just get down to it. (To the witness:) Have you paid any of that to Mr. Blumenthal?

THE WITNESS: No sir.

THE WITNESS: No sir. (R.p. 474-475)

No. 7369

APPENDIX TO REPLY BRIEF OF PLAINTIFFS LEON REINER AND WIFE, BERTHA REINER, APPELLANTS, IN THEIR CROSS-APPEAL No. 7399, AND APPELLEES IN DEFENDANT'S APPEALS No. 7382 AND No. 7422

United States Court of Appeals for the Fourth Circuit

Office
OCT
FILED

No. 7382

ISADORE D. BLUMENTHAL,

Appellant

v.

LEON REINER AND WIFE BERTHA REINER,

Appellees

No. 7399

LEON REINER AND WIFE BERTHA REINER,

Appellants

v.

ISADORE D. BLUMENTHAL,

Appellee

No. 7422

ISADORE D. BLUMENTHAL,

Appellant

v.

LEON REINER AND WIFE BERTHA REINER,

Appellees

Appeals from the United States District Court for the Western District of North Carolina at Charlotte

COOLEY & MAY
Nashville, N. C.
BATTLE, WINSLOW & MERRELL
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United States Court of Appeals for the Fourth Circuit

No. 7382

ISADORE D. BLUMENTHAL,

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v.

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Appeals from the United States District Court for the Western District of North Carolina at Charlotte

APPENDIX TO REPLY BRIEF OF PLAINTIFFS LEON REINER AND WIFE, BERTHA REINER, APPELLANTS, IN THEIR CROSS-APPEAL No. 7399, AND APPELLEES IN DEFENDANT'S APPEALS No. 7382 AND No. 7422

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Plaintiffs move the Court to set aside the verdict entered in the above entitled action October 11, 1956, and the Judg-

ment entered thereon on October 11, 1956, and to enter Judgment in accordance with plaintiffs' motion for directed verdict. Plaintiffs' motion for directed verdict should have been granted because:

(a) All the evidence showed that on 23rd January, 1951, defendant was indebted to plaintiffs for balance of purchase price of 45 shares of stock in L & B Reiner, Inc. on promissory notes aggregating $140,000.00, and that the balance due on said notes with interest on 23rd January, 1951, was $158,900.00.

(b) All the evidence showed that one of the plaintiffs had brought action in the Supreme Court of New York against the defendant to recover on said indebtedness and that said action was pending on 23rd January, 1951.

(c) All the evidence showed that on 23rd January, 1951, the plaintiffs had retained an attorney, Judge Miller, now deceased, of the firm of Blumberg, Miller, Aberman and Singer, and the defendant had retained Mr. Epstein (now Judge of the Supreme Court of New York), of the firm of Hayes, Wolfe, Schwabacher, Sklar and Epstein.

(d) All the evidence showed that on 23rd January, 1951, the plaintiffs and the defendant entered into a written agreement of compromise and settlement, accord and satisfaction of all matters and things in controversy between them relating to or arising out of or connected with the indebtedness of $158,900.00 on promissory notes from the defendant to the plaintiffs (Plaintiffs' Exhibit 3); executed mutual releases of all rights, liabilities and obligations up to that date with the express exception of the rights, liabilities and obligations created by said written agreement of compromise and settlement (Plaintiffs' Exhibit 5); and through their respective attorneys executed a stipulation discontinuing the

pending action in the Supreme Court of New York (Plaintiffs' Exhibit 4).

(e) All the evidence showed that all defensive contentions made by the defendant in his answer, including his contentions of failure of consideration, fraud and deceit, irregularities in the organization and operation of L & B Reiner, Inc., alleged mismanagement by plaintiffs of L & B, Inc. were based on transactions which occurred prior to 23rd January, 1951, and all such contentions were compromised and settled by written agreement on that date, executed by the parties under advice of counsel.

(f) All the evidence showed that in pursuance of the agreement of compromise and settlement (Plaintiffs' Exhibit 3, Paragraph 2(b), defendant executed the two promissory notes sued upon in this action (Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 2).

(g) All the evidence showed that no payment of either principal or interest has been made on either of said notes and that the defendant, of his own volition, failed and refused to pay the note for $10,000.00 which became due on November 15, 1951, and defaulted on said date, and that thereupon both the notes became due and payable under the contract and according to the tenor of each of said notes.

(h) The contract of compromise and settlement (Plaintiffs' Exhibit 3), shows that on 23rd January, 1951, in consideration of the payment on that date by the defendant to them of the sum of $25,000.00 in cash (Paragraph 2(a)), and the execution of the two notes now sued upon in the sum of $25,000.00 (Paragraph 2(b)), (which defendant himself testified he regarded as $25,000 cash paid by him), the plaintiffs released the defendant from any personal liability for the balance due on the total debt, to-wit $108,900.00.

(i) All the evidence showed that the defendant has made no payment on said balance of $108,900.00 except by transfer of the defendant's 45 shares of stock in L & B Reiner, Inc. to the plaintiffs on November 15, 1951, the date of the defendant's default in the payment of the first note, which was automatic under paragraph 2(c) of the contract, which transfer, under the only permissible interpretation of said contract, was accepted by the plaintiffs in full discharge and satisfaction of the said balance of $108,900.00, although the actual book value of the stock on November 15, 1951, was only $55,949.70.

(j) The rights of the plaintiffs and defendant are determined entirely under the contract of compromise and settlement, January 23, 1951.

(k) Under said contract, the 45 shares of stock were substituted for the personal liability of the defendant as the only source of payment for the balance of $108,900.00, the dividends and other income and the book value of said stock being set aside and pledged as the security, and the only security, for said balance, and the certificates for the shares of stock were issued to the defendant and by him transferred back by endorsement to the plaintiffs by way of pledge or collateral security for said balance in accordance with the contract.

(l) All the evidence, including the only reasonable interpretation of the contract, shows that when the defendant, by his voluntary act in defaulting in payment of the note due November 15, 1951, effected a transfer of his 45 shares of stock to the plaintiffs at their book value of $55,949.70, the said book value was automatically applied by the contract itself in satisfaction of the balance of $108,900.00, payable only out of the fund arising from the "sale" of the stock, and that no part of said book value could lawfully be applied to satisfy the personal obligation of the promissory notes,

which were personal obligations of defendant, separate and apart from the debt for the "balance", which "balance", though otherwise not an enforceable debt, was payable from the income or proceeds of sale of the stock.

Harold D. Cooley
Nashville, N. C.

Francis E. Winslow,
P. O. Box 269
Rocky Mount, N. C.

Attorneys for Plaintiffs

NOTICE OF MOTION

To: Helms & Mullins and
Maurice A. Weinstein
Charlotte, North Carolina

Attorneys for Defendant I. D. Blumenthal

Please take notice that the undersigned will bring the above motion on for hearing before the District Court of the United States for the Western District of North Carolina, at the United States Court House in Charlotte, North Carolina, on the date and hour to be hereafter designated by the Judge of said Court.

Harold D. Cooley
Nashville, N. C.

Francis E. Winslow
P. O. Box 269
Rocky Mount, N. C.

Attorneys for Plaintiffs

COUNSEL'S CERTIFICATE OF SERVICE ON ATTORNEY FOR DEFENDANT BY MAIL

I, Francis E. Winslow, of counsel for plaintiffs in the above entitled action hereby certify that on the 16th day of October, 1956, I served the foregoing Motion for Judgment Notwithstanding Verdict and Notice of Motion, consisting, with this page, of four pages, upon Fred Helms, Esq., Attorney for Defendant, by depositing two copies in the United States mails, postpaid, certified mail, addressed to him at 520 Law Building, Charlotte 2, North Carolina, his last known address.

Francis E. Winslow
P. O. Box 269
Rocky Mount, N. C.
Of Counsel for Plaintiffs

FEW:kem

RULINGS OF COURT

[TR. PP. 36-37]

THE COURT: I recall now that I was impressed at the time, and I am impressed equally as vividly now—probably more so since it has been meticulously read and heard by me—that the defense of fraud, that the defense set up in the first, is abrogated by the agreement that was entered into between the parties. I say, that is my thought about the matter. And that the second defense interposed is likewise not good against the admission of the parties of the execution of the notes. I get it back in my mind now.

* * *

[TR. PP. 49-50]

MR. WEINSTEIN: Going further, your Honor — and I realize that we all want to get on with the trial of this matter —we strenuously feel that in order to interpret this contract, what took place before is absolutely essential for the jury and the judge to understand the meaning of it.

THE COURT: Gentlemen, I will state this: Mr. Blumenthal, whom I know and who is a man of fine business judgment and good sense—I do not know these other parties, but I assume they are equally as well poised in financial matters—but when they got together and drafted their contract, I am going to hold that everything in the world up to that time merged into that contract and that each is bound according to the terms thereof. I will have to do that in order to consistently follow what I understand the law to be.

We will make our record, and we have our jury, and if the peremptory instruction goes against you, you have the benefit of that. You can see that I can try this case before a jury much easier than I can write an opinion about it.

* * *

THE COURT: Yes, sir. But I think that when they entered into the contract, everything up to that time, in the absence of lack of ability to contract, is merged into it, and that is what you all seem to have done there. Whether it was good or whether it was bad, I do not know.

STIPULATION AS TO PLAINTIFFS' OBJECTION TO A CERTAIN LINE OF TESTIMONY

[TR. P. 92]

MR. WINSLOW: Objection for the additional reason it is prior to January 23, 1951. If your Honor please, rather

than have me make that objection each time he goes back of that date, would counsel stipulate that the objection will be regarded as having been made for every question relating to the period prior to January 23, 1951? * * *

MR. WINSLOW: Your Honor, I don't want to keep repeating the objection.

MR. HELMS: I am perfectly willing to stipulate.

MR. WINSLOW: He has stipulated.

COLLOQUY

[TR. PP. 111-112]

MR. WINSLOW: May I enter an objection on another ground, on this line of testimony? It's evidently addressed to those allegations in the answer to the effect that Mr. and Mrs. Reiner as officers and directors have been guilty of negligence or malfeasance in their office and have wasted the assets of the corporation. Since the corporation is not a party to this action and is not seeking an accounting from Mr. and Mrs. Reiner, it seems to me that it is just a matter between two other fellows and is completely immaterial and irrelevant in this lawsuit; because Mr. Blumenthal, as a stockholder, has no right of action to bring the officers to account. No one can do that except the corporation itself.

THE COURT: Evidently you all have injected so much in this lawsuit that it is sort of like a rolling snowball.

RULINGS OF COURT

[TR. P. 118]

THE COURT: The lawsuit is not predicated on an accounting to the stockholders, or it would be a different

thing. It is predicated on recovery to the plaintiff on his effort to get a money judgment on two notes against the defendant Blumenthal.

* * *

THE COURT: That point is one we will consider in due time. But about operating as a corporation, I do not see the relevancy of that. That is one of the present-day troubles in handling a case in court. They make a case so big that you lose sight of the case, in other words, you cannot see the forest for the trees.

* * *

[TR. PP. 121-122]

THE COURT: Gentlemen, I have laid out the yardstick in this matter, that is to say, that if it is shown to me that there was a contract entered into in 1951, I will instruct the jury that nothing prior to that time would be competent in this case; because any understanding they had would be a meeting of the minds there, and the law would presume everything was merged into that contract.

* * *

[TR. PP. 141-142]

THE COURT: Assuming that to be true, there is no action brought under the statutory rights to dissolve the corporation or otherwise cause it to cease to do business, or anything of that kind, is there?

MR. HELMS: No, sir. But we say that both under the New York law — statutes — under the Charter and By-Laws of this corporation, and under the decisions of any courts that have passed on it, such as the *Park Terrace* case and the *Crosland-Cullen* case, that not only did the two acquire and own all of the stock, but that there never was but two directors and never but two stockholders in this so-called corporation.

THE COURT: Assuming that to be true, what effect does that have on these two notes that these two individuals are suing on?

MR. HELMS: There is no consideration at all for them. There wasn't any validly issued stock at any time.

THE COURT: You set that up as failure of consideration?

MR. HELMS: Yes, sir.

THE COURT: This stock, you know, was issued back in 1948.

MR. HELMS: They say it was issued. We say it was never validly issued.

THE COURT: Of course, this agreement in writing indicates that all other things were gone into and a new contract was made on January 23, 1951.

COLLOQUY AND RULINGS BY COURT

[TR. P. 143]

MR. COOLEY: If your Honor please, may I call the Court's attention to the fact that Mr. Helms has just finished introducing evidence, pages 42 and 43 of the record, which clearly indicates that his client, Mr. Blumenthal, not only knew all these things but he attended a meeting. He was Vice-President of the corporation on May 4, 1950, according to his own evidence which he has just introduced; and I assume he knows what he has introduced. Mr. Reiner and Mrs. Reiner and Mr. Blumenthal attended these meetings as the only stockholders. Now, for him to say he didn't know about it—and this was in 1950, before that contract was even signed.

* * *

[TR. P. 145]

THE COURT: Gentlemen, I do not think we are really concerned with the corporation, because I think its affairs are a side issue to this controversy here. I think this case here is purely and simply an action by these two parties to sue on two notes to acquire a debt which they allege Mr. Blumenthal owes them for the purchase of stock. That is what it is all about.

* * *

[TR. P. 146]

THE COURT: This concern here was issued a charter by the State of New York. I do not know what business it was engaged in. That has never come out yet. They could have been selling gold dollars for all I know. I do not know what it was, but certainly somebody thought it was worth a lot according to these transactions.

* * *

[TR. PP. 147-151]

MR. WINSLOW: May I make a motion, your Honor, please?

THE COURT: Yes, sir.

MR. WINSLOW: I move that I be allowed to talk for two minutes.

THE COURT: Do what?

MR. WINSLOW: I move that I be given time to talk, if the Court please.

THE COURT: Go ahead. That will be all right.

MR. WINSLOW: I want to read you first three headnotes out of a case of *Harding* v. *Insurance Company*, 218 N. C. 129, on the subject of fraud. (Reading:)

"The essential elements of actionable fraud are a definite and specific representation which is materially false made with knowledge of its falsity or inculpable ignorance of its truth with fraudulent intent which is reasonably relied on by the other party to his deception and damage."

The second headnote is this (reading:)

"The purchaser of real estate cannot maintain an action for fraud for misrepresentations concerning the value of the property or its condition and adaptability to particular uses when the purchaser has an opportunity to make full investigation and is not induced to forego investigation by artifice or fraud on the part of the seller."

And the third headnote is this:

"Where the purchaser of real estate relies upon misrepresentation as to the value of the property or its condition and adaptability to particular uses, he must plead want of opportunity to make investigation or artifice on the part of the seller inducing him not to do so."

Now, we have the gentleman buying the stock in 1948, a half interest in it, and an equitable owner from October 1, 1948; and on May 4, 1950, before he made these notes in 1951, he attended a meeting and he (knew) there were only three stockholders: himself and the two Reiners. He had, as a stockholder, the entire opportunity to see all the records he wanted to. The pleadings do not say that anyone tried to keep him from seeing them; they do not say that he asked to see them and they refused to let him see them. But he is a big businessman, with every opportunity to see these records, with business experience which enabled him to evaluate them, was sufficiently naive, you may say, according to him,

to be fooled by these people who had no advantage over him whatsoever. They were entirely on equal footing. The Supreme Court of the United States, in a similar case to this —

THE COURT: (To the jury:) Would you all step back in the jury room just a minute, please.

(Thereupon, the jury is excused from the courtroom, and the following proceedings were had:)

MR. WINSLOW: If your Honor please, I want to advert to the consideration. Mr. Blumenthal owed the Reir .s $158,000.00. He goes to them, and he says, "I just can't pay that amount." They say, "All right, Brother Blumenthal; pay us $50,000.00, and we will just give you the balance of $108,000.00 and let the stock stand for it." He says, "I can't pay but $25,000.00 now," and they say, "All right, we will take your notes."

THE COURT: Let me ask this question, now. This lawsuit here had its inception in 1948. Then, evidently, on the 23rd of January, 1951, the parties decided whatever contract existed as of that time, they wanted to amend.

MR. WINSLOW: Yes.

THE COURT: And they thereupon signed and entered into this contract here.

MR. WINSLOW: In 1951.

THE COURT: Of course, if someone got stuck, as the expression goes, that is not the fault of the court at all, and you cannot rectify getting stuck unless it was through fraud. That is all there is to it, using the language of the street.

I have known Mr. Blumenthal personally but not intimate-

ly. He is an outstanding business man and a man of fine character, in my opinion. But if he bought into something here and he got a pig in a poke, he got the pig and the poke; that is all there is to it, now. There is no way of getting around that at all.

In the absence of some fraud there which will militate the validity of these notes, I do not see any defense here that is warranted or that could be set up against it.

Your start off this way: Here are the notes which the evidence tends to show, and I think will satisfy anyone by the greater weight thereof, Mr. Blumenthal executed, which constituted a contract on his part to pay these parties; and as a further collateral to his note, which was not endorsed, these 45 shares of stock were placed up.

Now, the whole thing centers right in this contract. Let us take a little time and see what this contract says. That is the best thing to do, because after all, in my opinion, without regard to what happened about the corporation, they were all stockholders there, they knew the contents of the corporate affairs, and they dealt with it accordingly. I do not know. I may be speaking out of turn, but that is just the way it appears to me at that time. What happened to the corporation after that is absolutely beside the point, in my opinion. I thought about it last night. If it went absolutely on the rocks and is not worth a nickel, the Blumenthal notes are still there to be paid to the plaintiffs for the stock.

Now, if Mr. Blumenthal bought this stock, gave his notes for it, then it is absolutely beside the point entirely as a defense, in my opinion—and I will so instruct the jury when the time comes—that the acts and deeds of the corporation are purely and simply beside the point. It is what took place on the 23rd of January, 1951.

* * *

[TR. P. 156]

THE COURT: I think you are in the neighborhood of solid ground. Now, let us read a little further here. We have got that. You see, they have talked about the making of those notes. These gentlemen all made this contract, and there is not a fool in the crowd. They are all smart. Do not worry about that. Every one of them is smart. Mr. Blumenthal can take care of himself, and I am satisfied Mr. Reiner can take care of himself. They entered into a contract, and all we have to do is interpret it. That is all. Some times these smart boys get sold short, too, you know.

STIPULATION AS TO BOOK VALUE

[TR. P. 184]

MR. HELMS: Of the 90 shares of stock at the time of default on November 15, 1951; and that the book value of the 45 shares of stock involved in this controversy on the same date, that is, the date of default, November 16, 1951, was $55,949.70. So with that stipulation in the record, then we have the determination of the book value, your Honor.

COLLOQUY

[TR. PP. 190-194]

THE COURT: So I will hold, and I will so instruct the jury on the evidence thus far at the proper time, that these parties owe Blumenthal $55,949.70 against which he owes them $25,000.00 and interest, and that he would be entitled to have and recover of the plaintiffs on his counterclaim such difference as there was between the $25,000.00 and the $55,000.00.

MR. WINSLOW: If your Honor please, I don't think I have been heard on that.

THE COURT: Beg your pardon?

MR. WINSLOW: I have been listening to him, and I have been listening to you, but I want to be heard on the interpretation of the contract.

THE COURT: All right, sir.

MR. WINSLOW: I want to first point out to your Honor that the 45 shares were never put up for collateral for the $25,000.00 worth of notes. I think I can show you that that is true.

They start out with $158,000.00. $158,900.00 is what he owes. And they said it was going to be paid this way: $25,000.00 in cash, $25,000.00 in notes, and in (c) they came to the book value of the stock, the Reiners to take over the stock at book value. Then in (d) it says, "The balance of $108,900.00 . . . be payable . . . out of dividends." Come on down to the end of that, and the dividends are assigned over (reading):

". . . payable to him at any time on or prior to September 1, 1958, to be applied against said balance of $108,900.00."

If the stock was assigned as collateral for the $25,000.00 notes, then those dividends should have been applied to those $25,000.00 notes instead of to the $108,000.00. But that isn't all. Those dividends are not applied to the notes. That is one evidence that they were not assigned as collateral to the notes.

Then we come down to (e), the book value of the stock, the liquidated dividend under (e) (reading): ". . . apply against the balance of $108,500.00 with interest as aforesaid and only the surplus, if any, shall be delivered to Blumenthal."

After paying $108,500.00 out of the liquidating dividends, the balance to Mr. Blumenthal regardless of the $25,000.00 of notes. They were independent transactions.

Come to paragraph 3. In paragraph 2(e), it defines the balance as $108,500.00; and in the next paragraph (reading): "Pending payment in full of the balance as aforesaid . . ." that is $108,500.00 or $108,900.00. (Continuing to read): ". . . Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum." That is, the balance of $108,900.00. It is not and never was collateral for the $25,000.00 in notes.

That is further bolstered by two other things. If you will come to paragraph 7, we talk about a voluntary sale between the two, and the third sentence (reading):

"Failing such bona fide offer of purchase at more than the book value of said stock, Leon Reiner and Bertha Reiner may purchase said stock at the said book value. At closing, if the stock is sold to Leon Reiner and Bertha Reiner they shall credit against the purchase price any balance still due on the purchase price of said stock or on any of said notes. . . ." showing that the balance due on the purchase price of said stock is distinct from the notes. I believe that does it. So if you will read paragraph 3 where—

THE COURT: Of course, this last up there—

MR. WINSLOW: Sir?

THE COURT: This last you spoke of, this paragraph 7, that is not operative because it never came about.

MR. WINSLOW: No, it never came about, but it reflects that there is a distinction between the balance due on the stock, which was $108,900.00, and the notes. The notes

were always treated as cash. They said, "We will settle and release you from personal liability if you pay us $50,000.00—$25,000.00 cash and $25,000.00 notes." The balance of $108,900.00 was the subject of the balance of this contract, and it was only for that balance of $108,900.00, or $108,500.00, as to which there was no personal liability that the stock was pledged, and paragraph 3 so says (reading):

"Pending payment in full of the balance as aforesaid. . . ." That is $108,000.00; no notes. "Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum."

When you add to that the other paragraph, that all the dividends are to be applied to "said sum" and nothing to the stock, you have it as plain as the nose on your face, sir, that this stock was never put up as collateral for the notes. These notes were taken without any security, just like cash. Consequently, when they were taken over under 2(c) at the book value, without any option or election, but by virtue of their obligation under the contract, they took it at book value. 2(c) says: nevertheless, the notes shall survive, regardless of what the book value of the stock was.

So that, your Honor, if this jury brings in a verdict and your Honor signs a judgment that we owe them $32,000.00 on their counterclaim, the judgment will never stick. It is not possible, because this contract is too plain. These notes are just like cash. Instead of giving us $25,000.00 treasury bills, he gives us his promisory note, and we took it just like currency. It has nothing to do with the pledge agreement.

* * *

[TR. PP. 199-201]

MR. WINSLOW: If your Honor pleases, paragraph 3

(reading): "Pending payment in full of the balance on aforesaid. . . ." That is $108,500.00. (Continuing to read): "Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum."

What Brother Helms is asking you to rule is that although that stock is collateral for "said sum" and there is $108,500.00 still in said sum, that balance, that you take $25,000.00 of that collateral and take it away from the $108,500.00, and cancel these notes with it, and make us pay him back the other $32,000.00.

In paragraph 3 they give it to us as collateral for the balance, and he is asking you to render a judgment that takes it away from us as collateral. Completely. For the $108,000.00, with no security whatsoever; and leave us liable to pay him, when he owes us a balance—not a personal responsibility but one that is fixed on this stock—of $108,500.00. The stock itself is the debtor. It is worth $55,000.00. We take it. Where are you going to apply the money? Are we going to apply it on the debt for which it was pledged, it being the only source of payment for that debt? Or is it going to be taken away from us and used to cancel out $25,000.00 worth of notes that we accepted just like cash? They are asking us to pay back the $25,000.00 cash that they paid us. They made a settlement. They said, "We will pay you $50,000.00; you relieve us from personal liability for the balance of $108,000.00, and let the stock stand for that by itself." Now they come here, because the stock is worth $55,000.00, and they want to get the $50,000.00 back.

THE COURT: What dividends have been paid?

MR. WINSLOW: None whatsoever. No dividends have been paid. Consequently, the whole $108,500.00 is still due,

and we would like a stipulation to that effect—is still due unless and except to the extent it has been paid by our forfeiture of the stock and the book value thereof.

We contend that $55,000.00 has been credited on the $108,000.00, and we have got no chance of getting the balance, which was $108,000.00. We agreed to that in 1951, that the stock would stand for it—but that's $50,000.00 that we got for the settlement of letting him out of the $158,000.00. That's our money, and it can't be taken away from us. Not lawfully.

TESTIMONY OF I. D. BLUMENTHAL

[TR. P. 289]

MR. WINSLOW: I move to strike that, your Honor.

THE COURT: I will sustain the objection, as to what, if anything, he might have testified that is different from the contract.

MR. WINSLOW: Yes, sir.

THE COURT: Go ahead, sir.

MR. HELMS: We say, your Honor, that that is exactly in accord with the contract.

MR. WINSLOW: He said he was to get his stock.

THE COURT: The contract is in writing, gentlemen, so I will sustain the objection.[1]

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[1] This was omitted from defendant's appendix containing Blumenthal's statement on page 289 of the transcript that he had agreed with Mr. Reiner just before the January 23, 1951, contract was signed that he would *get the stock* as soon as the notes were paid, and the balance of $108,900.00 "would come out of profits."

* * *

[TR. P. 290]

Q Who did draw it?

A Their attorney, Judge Miller.

Q Who?

A Judge Miller.

Q That was not Mr. Matzkin?

A No. Not that I know of. The contract, I don't think Matzkin had anything to do with this one. It was uptown in another office. As I remember, there were several names in the concern, but they were always talking about Judge Miller.

* * *

[TR. P. 291]

Q How much did that make altogether that you had paid to Mr. and Mrs. Reiner on this stock deal?

A That made a total of $75,000.00, plus the two notes, would make a total of $100,000.00. But I was supposed to get my stock then.

MR. WINSLOW: Move to strike that out. That is not what the contract says would happen to the stock, and I would like for your Honor to rule on that.

THE COURT: Yes. I will sustain your motion.[2]

* * *

[TR. P. 296]

MR. HELMS: I was just conferring with my associates. Could we, now, at a later date put in the witness' answer, your Honor, to that question?

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[2] The question and answer by Mr. Blumenthal was printed in defendant's appendix. The motion and ruling were omitted.

[TR. P. 297]

THE COURT: You can do it at some later time, yes, sir.[3]

* * *

MR. WINSLOW: That is the stipulation signed by counsel?

MR. HELMS: Yes, sir. (Reading):

"*It is hereby stipulated and agreed* by and between the attorneys for the respective parties hereto that the above entitled action be and the same is hereby discontinued without costs to either party.

Dated: New York, January 23, 1951.

"Blumberg, Miller, Abram & Page
Attorneys for the Plaintiff

"(Undecipherable) & Epstein
Attorneys for Defendant."

Q This is your attorney's name, Mr. Epstein?

A Yes, sir.

Q But you say you yourself never did see this?

A No, sir. I know that in this contract that action was to be wiped out. I know that.

* * *

[TR. PP. 321-323]

Q Mr. Blumenthal, after January 23, 1951, and before November 15, 1951, did you have any conversations with Mr. Reiner with reference to this contract dated January 23, 1951, and if so, what and when?

A I had very little correspondence with him. I don't recollect if it was more than one or two or three letters, but

[3] This occurred just after the court ruled out the answer to the question asked on page 293 of the transcript. Defendant omitted from his appendix the Court's offer to put this answer in the record, *which was never done*. The question was as to the agreement about the payment of the notes, and about the stock. B.W.&M.

I had several telephone conversations with him. In one conversation I distinctly remember, because it was shortly after my father died. My father died in July, and this was in August. I remember that conversation because it lasted probably half an hour, and I know it cost me about $35.00. I have a vivid recollection of that one.

Q What was said between Mr. Reiner and you in that conversation?

MR. COOLEY: We object to that.

* * *

MR. WINSLOW: We object. The contract speaks for itself, and the notes speak for themselves, and there is no allegation in the answer that the 1951 contract was not a valid contract.

THE COURT: Sustained.

MR. HELMS: As your Honor has indicated, and as we desire, we would like to move along, but we would like to put the questions in the record and the answers.

THE COURT: We will do that later when the jury is out.[4]

* * *

[Minutes of meeting of stockholders of L & B Reiner, Inc. held May 4, 1950, show that I. D. Blumenthal attended as a stockholder, and Executive Vice President. These minutes are among the 54 sheets introduced by defendant Blumenthal as Exhibit No. 4, in Volume V of the Record filed, page 136 of the transcript.]

CROSS-EXAMINATION

[TR. PP. 342-344]

A Mr. Cooley, I told you that Mr. Reiner told me that

[4] It was never done. B.W.&M.

I was executive Vice-President, and I worked under that assumption, and he fooled me.

Q Mr. Blumenthal, don't you know that this lawsuit was born in New York after summons had been served on you, and up until that time you had never complained once about fraud or anything at all?

A I thought they had a corporation.

Q Now, your lawyers told you that there was some defect in the corporation, and therefore you file an answer in this case. Isn't that right?

A The lawyers didn't tell me. I can see from the records and from the minute book that there is no corporation. It is just a fake corporation.

Q I am not asking you to say whether or not it was a corporation. The Judge will determine that. But those books have been available to you every minute from the time you originally bought the stock, haven't they?"

A I took Mr. Reiner's word for it.

Q Wait a minute. You sent an auditor there, didn't you?

MR. HELMS: Just a minute, your Honor.

THE COURT: He is entitled to answer.

A I took Mr. Reiner's word for it.

MR. COOLEY: I don't want the witness to take over the examination, your Honor.

Q My question was: weren't these books available to you every minute and every hour from the time you bought the stock?

THE COURT: You can answer that yes or no.

A Yes, sir.

THE COURT: Now you can make any explanation.

A I don't know. I didn't see them.

Q You didn't see that when you signed your name to it? Look at it. That's your name, isn't it?

(Witness examines paper.)

Q Didn't you write that signature, Mr. Blumenthal?

MR. HELMS: Let him look at it.

MR. COOLEY: He is looking at it.

A (After examining:) Mr. Cooley, what is your question now?

Q Did you sign those minutes of that meeting?

A Yes, sir, that's my signature.

Q What is the date of it?

A Fourth of May, 1950.

Q So these books were available to you?

A I signed those minutes. They were not in the book, I remember. They were loose.

Q You sent your auditor there, didn't you, on more than one occasion?

A That's right.

Q You attended the stockholders meeting and signed the minutes of the meeting?

A I signed those minutes, yes, sir, but they were not in the book.

Q Did you ask to see the book?

A I don't believe I did. I had confidence in the man I was dealing with and I took his word for it.

* * *

[TR. P. 353]

MR. COOLEY: I want to identify all of these letters and have them marked as exhibits, because we are going to introduce them all.

THE COURT: All right, sir.

* * *

[TR. P. 360]

A No, I don't think I am smart, but I don't like to beat everybody like those New York slickers over there.

* * *

[TR. P. 375]

(Plaintiffs' Exhibits for identification were marked as follows: G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.)

* * *

THE COURT: (To the jury:) All of these letters, members of the jury, that are asked about and which appear to have been written by Mr. Blumenthal or copies kept or received by him prior to the date of this contract of January 23, 1951, on motion of counsel for the defendant are excluded.

* * *

CROSS-EXAMINATION

[TR. P. 381]

Q You said you had paid $100,000.00 on the stock to the Reiners?

A That's right.

Q That $100,000.00 would include the $25,000.00 we are now suing you for, wouldn't it?

A That's right.

Q So you have $100,000.00 in it when you pay the $25,000.00 on the notes ?

* * *

[TR. PP. 389-390]

THE COURT: Let me ask this question. All the matters and things that existed between you and the Reiner Corporation and previous to the 23rd of January 1951, at the expiration of that contract and of that date, everything simultaneously merged into the contract, did it not, and all the processes were closed as of that particular time? You passed papers and they passed papers?

THE WITNESS: That's right.

THE COURT: All right.

* * *

MR. COOLEY: We have the contract of 1951 in evidence, your Honor.

THE COURT: Yes, sir.

MR. COOLEY: I want to ask him one question about it.

Q All promissory notes executed by Blumenthal pursuant to the terms of said agreement shall be cancelled and returned to Blumenthal. My question is: Were those notes returned to you?

MR. HELMS: We object.

THE COURT: Overruled.

MR. COOLEY: It's out of the contract.

THE COURT: (To the witness:) He is asking you if those original notes of 1948 were returned to you and destroyed or—

THE WITNESS: Yes, sir.

THE COURT: All right, sir.

* * *

[TR. P. 104]

Q Mr. Blumenthal, in August, 1951—August 15, 1951—did you have a telephone conversation with Mr. Leon Reiner about this contract, about the notes issued under this contract, which is the subject matter of this suit?

A Yes, sir.

MR. WINSLOW: Objection.

THE COURT: Sustained.

MR. HELMS: May we at a later date put in his answer?

THE COURT: Yes, sir.[5]

OFFER AND EXCLUSION OF 1948 CONTRACT

(Plaintiffs' Exhibit 26)

[TR. P. 406]

MR. COOLEY: We would like to now offer the original contract.

* * *

MR. COOLEY: The original contract dated October 1, 1948, between Leon Reiner and Bertha Reiner and Isadore D. Blumenthal.

MR. HELMS: Object.

THE COURT: In view of the rulings heretofore made, the objection is sustained.

* * *

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[5] This was never done. B.W.&M.

[TR. PP. 407-408]

THE COURT: The 1948 contract ought to be marked for identification.

MR. COOLEY: I have offered that, and it has been rejected.

MR. WINSLOW: I just wanted to know the identification number.

THE COURT: I do not know if it has been given one.

(Plaintiffs' Exhibit No. 26 is marked for identification.)

MR. COOLEY: Then we want to offer the letters and documents identified by Mr. Blumenthal, which we understand your Honor ruled out, all dated prior to January 1, 1951.

THE COURT: I believe the Clerk marked all of those for identification, did you not?

THE CLERK: Yes, sir.

THE COURT: All right. Overruled.

MR. HELMS: Objection to each of those.

THE COURT: Sustained, yes, sir.

MR. COOLEY: Then we want to offer the letters and documents identified by Mr. Blumenthal bearing dates subsequent to January 23, 1951.

THE COURT: They are all eligible to go in, yes, sir.

TESTIMONY OF SAMUEL JACOBSON

[TR. P. 438]

Q Give us the book value as near as you can on January 23, 1951.

* * *

A In my opinion, the stock value was approximately the same as it was the last audit I made. It may have been a thousand more or a thousand less.

* * *

A Which was $112,062.42.

TESTIMONY OF LEON REINER

[TR. P. 448]

Q I say, has Mr. Blumenthal paid you any cash money or any other thing of value on the balance of $108,000.00 other than the book value of the stock at the time he defaulted?

MR. HELMS: Objection.

THE COURT: Overruled.

A No.

* * *

RE-DIRECT EXAMINATION

[TR. P. 476]

BY MR. COOLEY:

Q Mr. Helms asked you about whether or not you had tried to sell or had sold any of the stock in the L. & B. Reiner Corporation since the default, and you answered that you had not. I will ask you if you have sold or attempted to sell at any time any of the promissory notes given to you and your wife by the defendant, Mr. Blumenthal?

A Never.

PLAINTIFFS' TENDER OF ISSUES AND MOTIONS FOR DIRECTED VERDICT

[TR. PP. 495-496]

MR. COOLEY: * * * We move now, upon the tendering of this issue, for a directed verdict upon the issue. The issue is: In what amount, if any, is the defendant indebted to the plaintiffs as alleged in the complaint?

The defendant has admitted every pertinent fact that is necessary to show to entitle us to a favorable answer to that issue. We ask that that motion be ruled upon, and we say that any other issue is calculated to confuse and to disturb the whole lawsuit. And I don't see under the circumstances how it would be humanly possible for the Court to withdraw all the prejudicial evidence which has been admitted and which has gone into the trial of this case.

* * *

MR. WINSLOW: If your Honor please, before Mr. Cooley finishes and before Mr. Helms takes over, I want for the record to dictate some motions for the plaintiffs for your Honor to consider.

The first is the motion that Mr. Cooley has made that the one issue be submitted which he read.

The second is: That the Court direct a verdict for the plaintiffs on that issue according to the prayer of the complaint and refer to the Clerk the calculation of the interest to the date of the judgment * * * unless it can be stipulated.

Third: That all the evidence of the defendant and all the rebuttal evidence of the plaintiffs be struck from the record as insufficient to warrant an issue on any counterclaim, and that all the counterclaims be dismissed.

Fourth: That no issue be submitted on any counterclaim.

Fifth: That if such issue be submitted, plaintiffs' ex-

ception thereto be noted and that the Court direct a verdict on any such issue in favor of the plaintiffs.

That is our position for the record, and we would like for your Honor to rule on them seriatim and hear us as long as you will when Judge Helms gets through.

STATEMENT BY DEFENDANT'S COUNSEL ON FUNCTION OF COURT AND JURY

[TR. P. 501]

MR. HELMS: * * * Your Honor looked at the contract, went down the contract and said, "Here is what it is, and it's as clear as the noon day sun."

Now, if that is correct — and we say it is — then it is for your Honor to say what the contract means. Now, I don't see that there can be but one question, that is, I think the whole case is a matter for peremptory instruction by your Honor. * * *

* * *

[TR. P. 517]

THE COURT: The only question in this whole lawsuit is this, as I see it — I may be wrong, and the Court may say I am wrong — but this stock was taken over under the mechanics set up in this contract, the value of that stock was taken over and arrived at by the operation of the parties themselves; and the whole thing narrows itself down, if I get it correctly, as to where the application of this $55,000.00 is to go.

MR. HELMS: On that, your Honor, I think that is the question your Honor is asking.

STATEMENT BY PLAINTIFFS' COUNSEL ON FUNCTION OF COURT AND JURY

[TR. P. 525]

THE COURT: Now, let me hear from my friend Mr. Winslow over here. He says he is chomping at the bit.

MR. WINSLOW: If the Court pleases, I was very happy to hear Fred say that he agreed with us that it is a matter for the Court, that it is your responsibility and there is no jury in it. That ought to settle that.

LETTERS OF I. D. BLUMENTHAL

September 20, 1948

Mr. Leon Reiner
139 E. 23rd Street
New York 10, N. Y.

Dear Leon:

As soon as I returned to Charlotte Saturday morning, I got in touch with my folks, and I regret to advise you that I could not get Papa to agree to come to Wildacres for the Holyday services; consequently, I had to cancel all the arrangements I had made. I have already advised the chazan, but I am determined to hold these services next year, and I hope that we can all get together for this holy occasion.

I have in mind that I may go to Hot Springs, Ark., for the Holydays, and take the baths while I am there, but I have not decided definitely yet.

I want to take this opportunity to thank you and Bertha for your many courtesies and hospitality, and to tell you that it was a real pleasure to be with you last week. I felt just as if I had returned home.

I feel quite certain that the arrangements we made concerning Harry and the business will work out to everybody's satisfaction, and profitably. You have made a wise move, which should add years to your life and happiness to both Bertha and you, and Harry gets a wonderful opportunity that comes to very few men in a whole life time. He knows that and appreciates it. I believe that he planned to leave Charlotte either yesterday or today, and will probably see you before this letter arrives.

With my very kindest wishes,

Cordially yours,

(s) Isadore
I. D. Blumenthal

IDB:rme

P. S. Attached hereto you will find check for $94.00, which you so kindly gave Mr. Heller for me.

November 18, 1948
(Dictated Nov. 17)

Personal

Mr. Leon Reiner
139 E. 23rd Street
New York 10, N. Y.

Dear Leon:

Now that Harry has moved and is back, Madolyn and I would like for you and Bertha to come down here and stay with us a while, and I believe it would do both of you some good. I would like for you to come down now while the weather is mild because we would spend most of the time in the mountains. I am going to Greensboro tomorrow but

will be back Friday, and plan to go to the mountains Friday afternoon, so call me Friday morning and let me know when to expect you.

I told Harry when he started that I wanted him to write me at the end of each week and tell me how things are going along, and particularly how many machines we sell each week. I have his first three reports but they do not give me much information, and when he was here last weekend I told him to give me the report in dollars and cents. Now I would like for you to find out from Jacobson approximately how much business we have to do to cover expenses, and this will give me a guide on how we make out each week.

I think it would be a good idea also to list on Harry's weekly report how much the service charges amount to, because the Service Department must pay for itself, or better still, show a profit. I would like for Jacobson to tell me how much the Service Department costs to operate so that I will have this figure to compare with the service charges each week.

I do not know whether Eddie is in New York yet or not, but I want to suggest to you that you do not let Harry make the office too top heavy. Harry might think that he needs Eddie in the office, but you cannot have too many men in the office. I am a great believer in every man's producing, and by that I mean that every man should be out selling, calling on the trade. And when Harry gets his sales organization in shape and all the territories filled, he should have certain prospects to call on himself, but do not let Harry get started on the wrong foot by adding Eddie to the inside staff. He should have a quota and understand that he must sell a certain number of machines every week. I am going to watch the weekly reports closely to see how many machines are sold every week and by whom they are sold.

I hope that the doctors you have been going to see have

given you sufficient information to put you on the right track, but the main reason for this letter is to tell you that I am looking forward to your coming down here real soon. If you cannot come this weekend, make plans to be here for Thanksgiving, because we are planning to go to the mountains next Wednesday afternoon. Can you be here by Wednesday morning?

With kindest regards,

Cordially yours,

(s) Isadore
R
I. D. Blumenthal

IDB:rme

December 28, 1948

Mr. Morris B. Matzkin
270-271 Broadway
New York 7, N. Y.

Dear Morris:

When I was in New York last week at a Board of Directors meeting of the L. & B. Reiner Company, Leon gave me your invoice of November 23 in the amount of $764.

Frankly, at first I thought he was just kidding, but when he assured me that it was no joke, I told him to give me the bill and I would write to you, because I cannot make myself believe that you are serious in rendering such a ridiculous bill.

To begin with, I understand that the L. & B. Reiner Company have you to represent them on a retainer basis. Will you please write me exactly what the agreement is and

what it covers? I understand that they pay you $50 a month. What services do you render for this amount?

I might also mention while I am writing you that the conference covered by your invoice mentioned above was a very simple matter. I saw you in front of your home on Sunday afternoon, and on Monday morning when I arrived at the office with Leon you were making some corrections on the agreement you had written up for Leon and Harry, and you spent the afternoon figuring the amount of each note. Then in the late afternoon I had Elizabeth come over and retype the entire agreement, and to my way of thinking this service, or time, or whatever you want to classify it, was a very simple procedure. We did not argue even one point. I gave you a free hand, simply stating that I wanted you to write up a fair and equitable agreement.

You can't possibly be serious about this charge, now can you?

I want to take this opportunity to wish you and your family a very happy Chanukah, and with kindest personal regards,

Cordially yours,

(s) I. D. Blumenthal
I. D. Blumenthal

IDB:rme

Date: January 5, 1949

To: Mr. Harry F. Meltsner
From: I. D. Blumenthal

Dear Harry:

I should like for you to start making out the weekly sales reports in the manner that we discussed when I saw you last,

so that I will know how much business each man does each week.

I also believe it would be a very good idea if you made out a recap statement for the first three months showing how much business each man did and how much money was paid to him. When you have this ready, I would like to get a copy of it. I know that this would have a psychological effect on the men as well as give me the information that I want.

I also believe that each man should get a monthly statement the same as our men get here, regardless of what basis they work on.

Cordially yours,

(s) Dick
I. D. Blumenthal

IDB:rme

March 22, 1949
Dictated March 21, 1949

Dear Harry:

I have your letter of March 16, and exceedingly regret to see the poor sales you had last week of $6358 and $8000 the previous week because I know that means that we lost money during both of these weeks.

I wonder if you can send me a copy of each salesman's monthly statement. I hope that you are making a statement for each man for each month. If not, you want to do it right away because each man should be as much worried about his own condition as we are and, furthermore, I am all for firing any man who cannot earn his keep. I am not going to be in favor of keeping any man who cannot produce.

I hope that you accomplished some nice results on your

trip and that the men you put on in Baltimore and the Washington and Atlanta companies have started percolating.

Cordially yours,

(s) Dick
I. D. Blumenthal

IDB:fl

March 31, 1949
Dictated March 30, 1949

Dear Leon:

I received your wire on Monday and answered you that I cannot leave here before April 10, because I have to complete my deal here.

I am in the midst of a deal and have to see it through. In other words I have to do something here before I leave and could not possibly finish in time to meet you and Dr. Jones in Chicago without holding him up.

Since wiring you Monday, I received your letter of March 24, in which you advise me that Dr. Jones is planning to return to Sarasota April first. It may be possible that we will be able to see him later.

I don't plan to stay here for the Holidays because I have a lot of things to do in Charlotte and I am anxious to get back. I also have a lot of things to do at Wild Acres and I am planning on finishing up here probably by the end of next week. At one time I thought I would go right from here to New York but I am now thinking that I should go right straight from here to Charlotte and then come up to New York after a few days in Charlotte.

I am glad to see by Harry's last two reports that business has picked up and I hope that it will continue on the upgrade.

Cordially yours,

(s) Isadore
I. D. Blumenthal

IDB:fl

May 18, 1949

L & B Reiner Company
139 East 23rd Street
New York 10, N. Y.

Attention: Mr. Edmund Roberts

Dear Eddie:

I have your letter of May 16 in connection with the AMA Meeting in Atlantic City. I discussed this matter fully with Leon, who will let me know after the show opens whether the fellows that I want to see will be there, and if so I am going to try and make it. Otherwise, I am going to visit the factories with Leon a week or two after the show.

I do not think you have to worry about hotel accommodations for me, because if I am there for a night or two a cot could be placed in Leon's room.

I want to thank you and Saul for the weekly reports, and I too hope that they start perking up. I want you and Saul to put forth every effort to first bring the business back on a paying basis, and then to promote it further. I know that it can be done, and I would like to see you fellows do it.

Cordially yours,

(s) Dick
I. D. Blumenthal

IDB:rme

Written at Wildacres
June 1, 1949

Mr. Leon Reiner
L & B Reiner Company
139 East 23rd Street
New York 10, N. Y.

Dear Leon:

I have a copy of the profit and loss statement for the first seven months, sent to me by Jacobson, and I did not think that the loss was so big. In my own mind I estimated it to be $10,000 less, but I would say that his figures are correct. I feel quite sure that before the other five months go by we will have recouped all or the greater part.

I am enclosing the program for the Youth Conference at Wildacres and suggest that you talk with Stewart and Larry about it, because I think that both of them would get a lot of information and benefit greatly by this conference.

Cordially yours,

(s) Isadore
I. D. Blumenthal

IDB:rme
Enclosures

June 8, 1949

Dear Leon:

My auditor, Ted Morgen, is going on his vacation this weekend and is heading for Cleveland and Canada. On his way back he could very well stop off in New York and spend a day with you and Jacobson and go over the last audit of Jacobson's, because I know that you are just as disturbed about this as I am.

It is possible that Morgen, in going over the audit with you and Jacobson, will discover some things that might be of sufficient interest to warrant the time spent on this work.

I hope you understand, Leon, that I am not questioning Jacobson's figures. I simply think it would be a good idea because we may get some good audit criticism that will be helpful in changing the complexion of the next audit.

I still have my fingers crossed about going to Atlantic City, and of course if I do not hear from you and you do not call me from there, I will understand that the big shots that you want me to see have not shown up.

I hope that the convention will be successful, and that a lot of business will result from the leads that you will get at the show.

With kindest regards,

Cordially yours,

(s) Isadore

IDB:rme

P. S. Morgen expects to be in New York on either Thursday, June 23, or Friday, June 24, and will get in touch with you on arrival.

July 1, 1949

Mr. Leon Reiner
L & B Reiner Company
139 East 23rd Street
New York 10, N. Y.

Dear Leon:

I have your letter of June 29, and certainly regret that you will not be able to be with us during the B'nai B'rith Insti-

tute. You know best what you can do, so I won't insist.

Let me know if Dr. Jones will be in New York during the week of July 11, and I will arrange to come up. I would of course like to meet Dr. Jones, but I am not so concerned about him as I am about the cardiograph fellow, Mr. Roddy.

I just came down from Wildacres for the day and have not had time to talk with Morgen yet, but he told me very briefly that things do not look good, which of course you and I both know very well. Morgen also said something to me about a suit for $20,000 brought by Harry Meltsner, and I am wondering whether this is just a rumor or some action that he is contemplating.

I am arranging to see Harry right after the B'nai B'rith convention because it looks like a lot of straightening out has to be done with him.

Cordially yours,

(s) Isadore
I. D. Blumenthal

IDB:rme

July 1, 1949

Personal

Mr. Ted Morgen,
c/o Radiator Specialty Co.,
1700 Dowd Road,
Charlotte, N. C.

Dear Ted:

Sam Jacobson has worked up the enclosed Profit and Loss statement for the calendar years 1946 and 1947 and has asked me to transmit them to you personally. We both feel

that if you hand them to Dick, you will know from personal knowledge that Dick received them.

I believe that this is the information Dick was after, but if there is anything in addition that you want, just let us know and we will take care of it promptly.

It certainly was nice to see you again and my only regret is that I did not have more time to spend with you and Mrs. Morgen.

Cordially yours,

L. & B. Reiner, Inc.

By .....
S. S. Savadkin

SSS:MY
Enc. Statements

WESTERN UNION

July 21, 1949

Mr. Leon Reiner
L & B Reiner Company
139 East 23rd Street
New York 10, N. Y.

I will be in New York Friday Morning July 29.

I. D. Blumenthal

Straight wire — 9 words
Paid — Charge to Radiator Specialty Company
3:40 P. M.
rme

August 8, 1949

Dear Leon:

It was certainly nice spending the past week with you and Bertha, and I feel that the time was well spent and matters straightened out and accomplished.

Let me know when the contract is signed with Traugott and what, if any, change had to be made with Stahl.

I am enclosing some papers that belong in your files that I took along with me.

I overlooked leaving Twilight something, and I am attaching my check here for $3.00 which you might cash and give to her and tell her that I enjoyed her cooking and look forward to seeing her when I return on my next trip.

I hope that you went away Friday morning for a little rest and that you take good care of yourself from here on out, and do not let any of the problems that arise get on your nerves or worry you. And another thing, when you tell your lieutenants to do something, tell them once and tell them that you expect them to follow through so that it won't be necessary for you tell them a second and a third time.

I am going to confirm my conversation with Eddie, and will send you a copy.

Cordially yours,

(s) Isadore

IDB:rme
Enclosure

P. S. I want to write Paul Traugott a personal letter, so please send me his home address.

August 30, 1949

Dear Leon:

Attached hereto you will find a letter that I have just written Saul and Eddie telling them in a nice way that an average of $6070 for the past four weeks is no good and that they must do better.

I am putting an ad in next Sunday's New York Times, and I have a hunch that we will get a couple of good leads. I will bring them along with me when I come to New York. You will note by my letter that I expect to see you around the 10th of September, but I will advise you later when I will definitely arrive. I am planning to go to Los Angeles via New York, because I must see the Malamid before I take off and find out from him why he has to spend five days in bed with chest pains. This is definitely no good, and something must be done about it.

I hope that the Chicago trip did not take too much out of you, although I know how important it was for you to make your appearance at the wedding.

I was in town one day last week, and I know that you tried to reach me on the telephone. I also tried to reach you but was informed that you had gone to camp to get Vita. I hope it was nothing very important, but for your information, if you cannot reach me in Charlotte send me a wire to Little Switzerland, N. C. telling me to call you.

I hope that you are feeling better, and with best wishes.

Cordially yours,

(s) Isadore

IDB:rme
Enclosure

August 30, 1949

Mr. Edmund Roberts
Mr. Saul Savadkin
L. & B. Reiner, Inc.
139 East 23rd Street
New York 10, N. Y.

Dear Fellows:

I have before me your letters of August 12, 17, 19, and 24, also reports for weeks ending July 30, August 6, 13, and 20, and Hofferbert's July Statement.

I was glad to learn from Saul that you received the signed contract from EPL, and I read with a great deal of interest Eddie's three letters about his activities and plans. The four weekly reports average only $6070, accounting for 11 Joneses and 14 EPL's, which is not so good and puts us behind 16 Electrocardiotrons for August, and which is going to be difficult to overcome in September.

I see no sales recorded for either Baker or Coleman, and I want to suggest that when Eddie works with a new salesman he must sell at least one Jones and one Electrocardiotron while breaking in the new man to show him how it is done and to make a good impression on him. It is possible that Eddie did sell some equipment while working with these two fellows because I am mindful of the fact that Eddie has $4285 to his credit during the aforesaid period, which is about 20% of the total equipment sales.

I trust that you straightened out Lou Muller, and that your new man for lower Manhattan will pan out satisfactorily. I think Muller could do us some good, but the setup with Love is screwy. Maybe you ought to ship him back to Virginia.

I am glad to see Professional Equipment accounting for three EPL's during the past four weeks, although I cannot understand why you have them listed at three different prices. It is also nice to see Carolina Surgical buying two Joneses and two EPL's.

I see no business at all during these four weeks from Noahson, which is very bad.

It is good news to hear that Schulgasser is beginning to work again, although you cannot expect much from him under the circumstances.

I do not see any sales recorded from Murley, so I assume that he sold nothing.

Hofferbert also shot four blanks during the past four weeks, so it does not look like bringing him in did much good. I have only the last four reports here at Wildacres with me, but I know that the previous four reports indicated some business.

I know that you have a lot of things cooking, and as a result I will look forward to a better report for the week of August 27. Turn the steam on for the weeks of September 3 and 10, so that when I get to New York I will feel better about your sales. I expect to see you around the 10th of September.

Cordially yours,

(s) I. D. Blumenthal
I. D. Blumenthal

IDB:rme

September 26, 1949
Dictated Sept. 22, 1949

Mr. Leon Reiner
139 E. 23rd Street
New York, New York

Dear Leon:

I have been as busy as a proverbial bee since I arrived and you will have to pardon me for not writing you before.

I thought I would get a chance to see Ruthie Sunday but I just couldn't make it but I will see her next Sunday. I will call her in the meantime and let her know that I am in town and that I will see her. In the meantime I will talk to her on the phone.

I had a very nice visit with Mr. Mathis. He was waiting for us right at our railroad car. Then we went over to the hotel and had breakfast and he took us out to his plant and brought us back to the railroad station. We spent about five hours with him and had a delightful visit. He said that if he had known that Madolyn was along, he would have brought his wife and he said that he wanted to see more of us.

I asked him if he knew Bennett of the Picar Company but he said he didn't and I asked him to try and dig up somebody for us because we were planning to do an outstanding job both to his satisfaction and to ours. He showed me the new "Space Saver" Model and I believe that it will boost sales considerably.

I am planning to write him a letter and I will send you a copy. I, also, plan to write Eddy. I hope that he got back on the job more enthusiastic and pepped up.

Tell Saul that I haven't seen the weekly reports and that I want him to keep me posted as to what is going on.

I hope that you will enjoy the holidays and my best wishes for a healthy and happy New Year to you and yours.

Cordially yours,

(s) Dick
L
I. D. Blumenthal

IDB:fl

December 1, 1949

Mr. Saul Savadkin
L. & B. Reiner, Inc.
139 East 23rd Street
New York 10, N. Y.

Dear Saul:

I made two memos when I was in the office last Saturday, and I want you to follow through on them.

The first concerns daily reports from the salesmen. Somebody should inform all of the salesmen that we want daily reports showing each call that they make each day and an explanation as to what happened on each call. These reports should reflect their daily activities.

I understand that some of the men send them in, but all of them should send in these daily reports. I would like to see this put into effect because on my next trip we will analyze these reports carefully in order that we might ascertain the reason we are not getting any more business.

The other memo concerns Government business. I do not believe that we are getting any Government business, and I see no reason why we should not, unless we are specifically exempted in our contracts with our factories. I want you to

look into this matter, and if there is no good reason why we shy away from this business, take steps to be placed on the Government list to receive their invitations to bid, and place ourselves in a position to get some of this business.

I was talking with a fellow in Washington the other day who represents Phillips and whose entire activities are directed towards Government business, and all the equipment that the Government buys is based on bids.

Cordially yours,

(s) Dick
I. D. Blumenthal

IDB:rme

December 14, 1949
(Dictated Dec. 13)

Dear Leon:

I want you to give serious consideration to the matter that I discussed with you on my last trip and the trip two weeks previously concerning my notes which you hold.

When I first discussed this matter with you it was due to the fact that the bank with whom I do business loaned me a lot of money on my personal statement and told me that I could not get any further credit because I overstepped my bounds by giving you notes for $150,000. This placed me in a precarious position, because if I needed even a small amount I could get no further accommodation and my own business would suffer immeasurably. This is the first time in all of my business experience that I find myself in such a position.

This was bad enough, but I was content to let the matter rest and have been making every effort to reduce my indebtedness by ordering all purchases to be held down to the very necessities and cancelling out some of our program for new items until such a time as we relieve the tension, and I can assure you that this was no easy procedure in our setup. I had not complained to you about it because I felt that I had to work it out myself. On top of all of this I had to hold down necessary purchases because I had to pull out $27,000.00 to pay Harry Meltsner on the Reiner Company settlement.

It now develops that I will have to place myself in a position whereby I can again go to my bank to get money or credit so that I can endorse a note and make a bonafide offer to the Government on Ellis' behalf to buy his remaining assets. If I cannot do this I cannot salvage anything for Ellis, even though it may be only a shell or a few crumbs.

All my life I have been able to help everybody without regard to race, color, or creed, and now for the first time it becomes necessary to help my own brother and I am not in a position to do it, simply because you are holding said notes.

I know that the first series of these notes are already past due, and I know further that you are not going to force payment. As I told you over the telephone this morning, I would rather pass up the entire amount of money that I paid you for the stock than be in a position where I would be unable to help my brother.

I know that I am asking you to do something unusual, and I showed good faith when I paid you $50,000 and signed the notes without any question. I am not afraid that the Reiner Company is a lemon. I feel quite sure that when Sam makes up the first quarter's statement the business will have made up all losses, and starting the first of the year

it will begin to make its normal profit. I am not afraid one iota of the investment, and I feel that I have made quite a contribution to the Reiner Company.

What I want you to consider now is to return to me my notes and reduce my interest to the actual amount of money paid in.

I was content to let the matter stand since you were reluctant to come along with me, but now that Ellis' matter has come into the picture it is imperative that I do something, and I have got to be able to count on your cooperation.

I can tell you in all sincerity that if our cases were reversed you would not have to ask me to return your notes even a second time, because my friendship would be worth more than the notes.

I am not trying to get out of the deal, but I have got to place myself in a position to make a bona fide offer to the Internal Revenue Department on Ellis' behalf for a compromise settlement of their claim for all taxes.

I would like for you to write me your decision on this matter, but better still, since you are coming down this way and expect to be here this weekend, bring my notes along with you so that I can take them in to my banker next week and show him that I no longer have this obligation, and place myself again in a position where he will accept my signature on a bona fide offer for Ellis' remaining assets.

Cordially yours,

(s) Isadore

IDB:rme

December 16, 1949

Mr. I. D. Blumenthal,
Radiator Specialty Company,
1700 Dowd Road,
Charlotte, North Carolina

Dear Isadore:

I could write you volumes of reasons why I must decline your request for cancelling the notes and with it the agreement that we entered into in good faith. Each of the reasons that I could give you from my point of view is at least as good as the reasons that you give from your angle.

Your unusual request even in the circumstances that you find yourself at the present time, grieved me to such an extent that I could not get it out of my mind night and day. It has weakened me to a point that I dare not attempt to journey to Florida by car with Larry driving. Instead I hope to be able to take the train Wednesday. I am doubly on the spot, for even if I consented to such a thing, Bertha, to whom I mean as much as your brother and your father mean to you, will never consent to it.

I value your friendship a great deal and these are not idle words. As is evidenced by the fact that although at this period I need money more than at any time in the past 15 years, I am not pressing you to make good on your personal loan nor on the installment that is past due. I am compelled to give up an opportunity that comes to a father only once in a lifetime to help Ruth at this particular time and also be of assistance to Stewart after he gets married next month.

As long as I can get along and meet my personal obligations and as long as the business can function without additional capital, I intend to continue in the same attitude. I

believe that with your cooperation the Company will make enough money to pay off handsomely on your investment.

If this letter sounds cold-blooded and unsympathetic, I wish to assure you that with the writing of it went a good deal of my heart.

Sincerely,

.....

LR:MY

P. S. I am making a few minor changes in the Contract that you sent me for Cohen and as soon as it is drafted and accepted, I will send you a copy of it.

December 22, 1949

Dear Leon:

I have your letter of December 19 to which you attached a signed copy of Harold Cohen's contract. I am glad that this matter is settled, and I assume that he will start with you on January 1. I really believe that Cohen will do a job to the satisfaction of everybody concerned.

Now in connection with the clause covering issuance of stock, you will recollect that in our discussion we told Harold that there would be no objection to his purchasing stock but we did not tell him how many shares, and he did not say how much money he wanted to invest. However, we did tell him that I purchased 45 shares and paid $200,000.00, and practically told him that he could buy stock at this same price, which figures about $4444.00 a share. It was further agreed that this stock would have no voting power. This is my understanding of the stock discussion, so shortly after you return from Sarasota you should have Matzkin write this up and make it in the form of an amendment so that it becomes part of his contract.

I changed my plans about going to Miami because I found when I returned here that there was too much to do and I could not spare the time. It is no easy job to raise $100,000.00 by January 5, and so I will have to stay right here and keep at it; consequently, I will not be able to meet you in Sarasota. Sorry

Cordially yours,

(s) Isadore

IDB:rme

December 23, 1949
(Dictated Dec. 22)

Mr. S. S. Savadkin

Dear Saul:

I have your letter of December 20, also report for the week ending December 17, and I am certainly glad to see that report. It is the second best report this year, only topped by the week of February 19, and I hope that from now on all of the reports will be in this category, and there is no good reason why they should not.

Leon sent me a signed copy of Harold Cohen's contract, and I am glad to see that this fellow will get started with us on the first of the month.

Thanks also for communicating the information about the set of Encyclopedia to Harold for me.

Cordially yours,

(s) Dick
I. D. Blumenthal

IDB:rme

January 4, 1950

Mr. Saul Savadkin

Dear Saul:

That was certainly a fine report you sent me last week, and I know that the next one won't be as good because some of the fellows were in Chicago and Benson was on vacation.

I have not heard whether Cohen started on the first. Let me know.

I am anxious to get the set of Jewish Encyclopedia, and I wish you would ask Cohen what progress his wife is making on this matter.

Cordially yours,

(s) Dick
I. D. Blumenthal

IBD:rme

January 25, 1950

Mr. Leon Reiner

Dear Leon:

I have your letter of January 19, and I fully agree with you that these painful discussions, as you so aptly express it, should be forgotten. It will not do either one of us any good, and I certainly do not want it to hurt our feelings or our friendship.

I know how you feel about the business. I know the time and labor and thought that you put into it, and I want to help you preserve it and promote it. That has been my attitude all along, and I think that I have contributed a great deal to the business, but I do not want it to sap your health

or mine, because frankly, I do not think it is worth it, and I know you and Bertha will agree with me on this score.

Consequently, we should bend our energies now to making the business prosper. There is no reason at all why it should not go forward from now on, and I firmly believe that with our present personnel and policy we are on the right track and in the best position we have been since my entrance. In my last letter I simply wanted to confirm the fact that if we found it necessary, and this must be with mutual consent, to dispose of the business you would be willing to accept the payment of my notes plus $50,000.00 plus the money that the business owes you (I think that is represented by a $10,000.00 note).

I do not say that the business should be sold today. I think, as I have already stated, that we should first try our level best to make the business go forward, but if we find that the cost will be too much, healthwise, then the sensible and practical thing to do would be, as a last resort and under these circumstances, to dispose of it, not as a sacrifice but at a price where you would come out with a fairly decent price and where I would be able to get the money that I invested. I do not want now, nor did I want heretofore, any profit. If we found the right buyer and it brought more, you would be entitled to the overage.

I want to be fair about this matter, and I believe that you do too, so let's have matters pleasant as they have been up until my last visit.

Cordially yours,

(s) Isadore

IDB:rme

February 7, 1950

Mr. Leon Reiner

Dear Leon:

I have before me the four weekly reports for January, and it certainly looks bad for the outside salesmen. We discussed this with Eddie when I was in New York last, and I think it is time now that you step in and tell him definitely that something must be done, that we cannot afford to carry on this way indefinitely.

It is my suggestion that he go to Boston and stay there until he finds someone who can really do a job. While he is there he will of course get business himself, and get Boston started properly.

I do not think any of the six men on the list are worth a damn, and I would concentrate on replacing these fellows right away. I mean give this matter preference over getting additional dealers started.

Cordially yours,

(s) Isadore

IDB:rme

March 8, 1950

Mr. Edmund Roberts

Dear Eddie:

I have your letter of March 6. Dr. Ross is still considering the Cardiotron, and I would suggest that you contact Carolina Surgical in Raleigh and have them see Dr. Ross. I will also keep behind it.

I cannot understand why you continue to keep working on the dead horse you have in Boston. Mathis' comment that

you have a nice boy in Boston is further confirmation that Kaplan is no salesman. It seems to me that the time you spent in Boston could have been spent on a new man, and the sooner you realize this and get a new man in Boston the sooner we will get some business out of this good territory.

You mention that you cannot spend too much time in any one location since New York still requires your help on sales and training the new men. I do not believe that you are going to do a good job on the outside work if you are going to divide your time in this manner, and I think you ought to discuss this with Leon and decide whether you are going to concentrate on the outside territory or divide your time as you mentioned.

To my way of thinking, Niedermayer is just using the present difficulty with the Cardiotron as an excuse. He did not sell any when we did not have any trouble with the Cardiotron, and it seems to me that he could do a job by concentrating on the Jones. This fellow should be replaced right away or at the first opportunity.

I agree with you, Eddie, that the problems are involved and somewhat complex and that I could be more helpful if I were on the ground, but the things that I have been writing you about are so obvious that it isn't necessary to get any closer to get a better picture. I understand fully that it isn't so simple to find a man, but at the same time I know that they can be found. It can't be done over night, but we decided to replace these men some weeks before Christmas, and it seems to me that enough time has elapsed to have located and trained at least one or two men.

I am sending a copy of this letter to Leon so that you can discuss it further with him, and whatever decision Leon makes will be all right with me. However, I cannot emphasize too strongly the absolute necessity of your going to

Boston and staying there until you find and train a man and feel sure that he can carry on, and then do the same thing in Baltimore and Washington.

Cordially yours,

(s) Isadore

March 13, 1950

Mr. I. D. Blumenthal,
Radiator Specialty Company,
1700 Dowd Road,
Charlotte 1, North Carolina

Dear Isadore:

I avoided writing to you because there really isn't anything that I could add to what you already know from the correspondence that you receive from Mr. Cohen, Eddie Roberts and the regular weekly reports that you receive.

I waited also before writing to you to see some results from the activities of Mr. Cohen and his crew. Perhaps it is too early to judge yet. We will have to give it more time to appraise his contribution to increase sales.

As March is drawing to an end and with the first quarter of 1950, I should like for you to arrange to come here to examine with me the first six months activities and plan with us for the future. I believe that you should visit us around the 10th of April and plan to stay for at least a week. Sam Jacobson has promised to rush the figures as soon as we can close our books for March.

From the Accounting angle, your figure of $7700.00 average per week since the first of the year is off considerably according to our books. Shipments for January overaged

$38,000. and for February there were also about $38,000. That is probably due to the fact that many of the sales that were made last year were not delivered until January and February. We only bill for merchandise not when the order is taken but when it is delivered.

I am as disappointed as you are with the results in general and particularly with the situation in Boston. I planned to be there tomorrow, Tuesday, but I literally was not able to get myself out of bed until after 3 o'clock this afternoon. I thought that if I felt better I would take the train, go to Boston and remain there until that office is perculating properly. At this moment, 5 o'clock, I am afraid to undertake the venture.

From this angle it might be sufficiently important for you to come here to discuss it without delaying another three or four weeks.

Hope this letter finds you and yours in good health.

Sincerely yours,

.....

Leon Reiner

LR:MY

May 12, 1950
Written at Wildacres

Mr. Leon Reiner

Dear Leon:

I feel that the past week which I spent with you in New York was well worth while, and I feel that the Cardiotron situation is under control. I am glad that we got a 90-day concession from Howse, and I really believe that he will straighten out the troubles and give us an even better machine than we got from Traugott.

I have written Howse as per the attached copy, and I want to suggest that you get a letter from him confirming our discussion in order that we might have something in writing, principally to the effect that he is not going to make any changes in the territory for 90 days, with the exception of the Florida situation, on which he requested that you write him a letter. In other words, we want to hold him to the deal that we made, and it is best to have it confirmed by him in a letter, because as stated, I feel that he will straighten out the trouble and give us a machine that we can sell.

I also had a good opportunity to talk with all of the men individually as well as at the meeting on Wednesday night, and particularly with Cohen. I am going to confirm my conversation with Cohen and send you a copy. I believe that Cohen understands now what we expect because I made it plain that we were not satisfied with the present results. He said he wasn't either.

Let me remind you to get that matter I discussed with you straightened out with Eddie Roberts, and the time to do it is now when you confirm the new arrangements with him. Incidentally, I forgot to ask you whether you confirmed the bonus arrangement with Savadkin, because you will remember that we discussed this bonus matter with both Savadkin and Roberts. In a manner, Roberts would be entitled to 5% of the profit as shown on the March 31, 1950, audit report, but this bonus arrangement should be discontinued when you confirm the new arrangement.

I enjoyed being with you and Bertha, and thanks for your kindness. Take care of yourself, and with kindest wishes,

Cordially,

IDB:rme
Enclosure

(s) Isadore

July 13, 1950

Mr. Leon Reiner

Dear Leon:

I have not heard from you in some time, but Saul has been sending me the weekly reports and also keeping me posted on what's going on. I am glad to see that sales are improving, and I know that it is due to your efforts. It is most regrettable that I have not been able to get up to New York, and I do not want to write you all the trouble that I am having here with Ellis's case. He was due for parole on May 1 but they are still holding him, and we have not been able to agree on a settlement.

I have been to Washington several times and I am due to go again some day next week, at which time I hope that we will at least be able to get him out, and probably make a settlement. When this is accomplished my mind will be relieved, and I might at least be able to come up and talk with you.

You might feel that you have had your hands full and lots of worry and trouble, but let me assure you that it is nothing compared with what I have had to contend with the past few months.

Saul wrote that Bertha was not feel well, which caused you to pass up the California convention, but I hope she is feeling all right now.

When Jacobson has the June 30 audit ready I would appreciate a copy of it so that I may look it over and discuss it further on my next visit with you.

With kindest wishes,

Cordially yours,

(s) Isadore

IDB:rme

July 24, 1950

Mr. Leon Reiner

Dear Leon:

I have your letter of July 18. Saul also sent me the report for the week of July 15. I have been closely watching the weekly reports, and while they are not bad I can't exactly call them good. Personally, I do not feel that the war scare is going to hurt our business.

I returned from Washington Friday, and I believe that I made some progress with Ellis's matter, and I arranged another meeting here in Charlotte for Thursday. I am hoping that within the next couple of weeks I will be able to straighten the matter out, and get him released so that he will be able to wind it up himself. If I am successful I will then be able to come up to New York to discuss with you the situation and lend you what assistance and advice I can.

This matter has given me considerable concern, and I am hopeful that very shortly I will be able to straighten it out to the point where I will be further relieved of the trouble and worry.

I hope that you are taking care of yourself and that the family is well, and with kindest regards,

Cordially yours,

(s) Isadore

IDB:rme

e

July 27, 1950

Mr. Saul Savadkin

Dear Saul:

I have your letter of July 25 with Leon's post script and to which you attached your check for $10,000.00.

I can't handle this matter. I told Leon when I was in New York last trip and the previous trip that my credit has been ruined on account of the notes that I gave him. I can't borrow any money. This thing has caused me no end of worry, and I tried my level best to explain it to Leon on my last two or three trips, and therefore, I do not understand why you even sent me this request for an exchange of checks.

I am also returning Jones' letter which you sent me, and this letter does not sound right to me at all because Leon has been doing business with this outfit too long to be turned down. The fellow who wrote this letter is no doubt the one responsible for getting the money in, but your letter should have been directed to Dr. Jones himself.

I have been forced to pay some bills by giving the supplier a note, and I believe that this is also your solution, because the Jones Company can take your note to the bank, discount it, and get the cash.

I was under the impression that Leon understood my financial position as well as the concern I have had over my notes he is holding, but by permitting you to send me this check and make this request he evidently does not understand the situation.

I wish there were some way I could help, but those confounded notes have me tied foot and hand.

Cordially yours,

(s) Dick
I. D. Blumenthal

IDB:rme
Enclosure

November 13, 1950

Mr. Saul Savadkin
L. & B. Reiner, Inc.
139 East 23rd Street
New York 10, N. Y.

Dear Saul:

I have your letter of November 8 with the enclosures which I am returning herewith:

1. Balance sheet, Exhibit "A", and Statement of Income, Profit and Loss, Exhibit "B", for the year ending December 31, 1946.

2. Balance sheet, Exhibit "A", as at September 30, 1948. This report represents the nine month period, January 1 to September 30, 1948, at which time I entered the corporation.

In looking through my files I found a copy of the Profit and Loss Statements for the years 1946 and 1947, which you sent me on July 1, 1949.

I showed these statements to my banker, and I believe that I convinced him of the possibilities of the Reiner Company. Tell Leon that I will call him just as soon as I can get a definite maximum commitment from him.

Cordially yours,

(s) Dick
I. D. Blumenthal

IDB:rme
Enclosures

c.c. to Mr. Leon Reiner

January 5, 1951

Mr. I. D. Blumenthal,
c/o Radiator Specialty Co.,
1700 Dowd Road,
Charlotte 1, N. C.

Dear Dick:

Enclosed is our sales report for the week ending December 30, 1950. This report covers the holiday week and reflects the situation insofar as business at that time is usually very low. Actually, the sale credited to Mr. Murley was one consummated some time ago, but the Contract was not signed and deposit received until last week.

Mr. Murley is progressing nicely and is now able to sit up at the table for 3 meals. He is permitted no visitors as yet, but I keep in daily touch with him through his daughter.

Milt Benson and Marty Spitzer are out at the Fischer factory this week attending the Refresher Course. It certainly should prove beneficial to both of them and to the Company.

Leon is back on the job this week and his visit at Florida appears to have been beneficial to him. I understand that you are expected up here next week and look forward to seeing you.

Due to the Holiday Season I felt it advisable not to insert the Ad as we originally planned. They are appearing this Sunday in the New York Times, Baltimore, Washington and Richmond papers. I have also been in touch with several Agencies who specialize in technical personnel and they are looking for men to fit our specifications.

The war situation is not helping us any at this time as many of the Doctors are extremely jittery about their chances of being drafted. We have had several cases already of Doctors being called into service and they certainly are not too anxious to make commitments under the present conditions.

Cordially yours,

.....

S. S. Savadkin

SSS:MY
Enc. Sales Report

March 30, 1951

Mr. Leon Reiner

Dear Leon:

I have not heard from you since you called me on the telephone last week, so I do not know whether you have gone to see Ruthie. I am afraid that I will not be able to get to New York now. I am not feeling well, and I am going to have to get away from the office for a while. I am planning to go up to Wildacres and take it easy for a couple of weeks, and maybe I will feel better.

I am anxious to know how we came out the first six months. See if you can get Jacobson to make up a profit and loss statement as of March 31 and let me have it when it is ready.

My auditor, Dan Hackney, is leaving Saturday for Toronto to officially check out our Canadian manager and check in a new man. He will be up there a couple of days, and on the way back I have asked him to stop off in New York and

look over the books. Hackney has done a lot of public accounting, and he may be able to come up with some good suggestions.

I told him what the business had done prior to my entrance, and he may want to make some comparisons. I want to get my records here straight. I never have set them up, even though I did send Morgen in there one time to do this.

I do not know how much time Hackney will spend up there or how long he will want Jacobson, but I want you to call Jacobson and tell him that Hackney will be there and to give him what information he wants. I do not believe, however, that Dan will take up much of Jacobson's time.

I hope that you are feeling all right, and with kindest regards to both you and Bertha,

Cordially yours,

(s) Isadore
I. D. Blumenthal

IDB:rme

United States Court of Appeals for the Fourth Circuit

No. 7382

ISADORE D. BLUMENTHAL,
Appellant

v.

LEON REINER AND WIFE, BERTHA REINER,
Appellees

No. 7399

LEON REINER AND WIFE, BERTHA REINER,
Appellants

v.

ISADORE D. BLUMENTHAL,
Appellee

No. 7422

ISADORE D. BLUMENTHAL,
Appellant

v.

LEON REINER AND WIFE, BERTHA REINER,
Appellees

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte

COOLEY & MAY
Nashville, N. C.
BATTLE, WINSLOW & MERRELL
Rocky Mount, N. C.

HAROLD D. COOLEY
HUBERT E. MAY
FRANCIS E. WINSLOW
Counsel for Leon Reiner and Bertha Reiner

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United States Court of Appeals for the Fourth Circuit

No. 7382

ISADORE D. BLUMENTHAL,

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v.

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Appellees

No. 7399

LEON REINER AND WIFE, BERTHA REINER,

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LEON REINER AND WIFE, BERTHA REINER,

Appellees

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte

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APPENDIX TO BRIEF OF PLAINTIFFS LEON REINER AND WIFE, BERTHA REINER IN THEIR CROSS-APPEAL No. 7399

PLAINTIFFS' EXHIBIT No. 26

Agreement Dated 1st day of October, 1948

THIS AGREEMENT made and entered into this first day of October, 1948, by and between LEON REINER, residing at No. 260 Paine Avenue, City of New Rochelle, State of New York, hereinafter referred to as the party of the first part, BERTHA REINER, residing at No. 260 Paine Avenue, City of New Rochelle, State of New York, hereinafter referred to as the party of the second part, ISADORE D. BLUMENTHAL, residing at 1720 Dowd Road, City of Charlotte, State of North Carolina, hereinafter referred to as the party of the third part, and L. & B. REINER, INC., a domestic corporation, having its principal place of business at No. 139 East 23rd Street, Borough of Manhattan, City of New York, party of the fourth part and sometimes referred to herein as the "corporation,"

WITNESSETH:

WHEREAS, the parties of the first and second parts are at present the sole and only owners of the capital stock of L. & B. REINER, INC., a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York, party of the fourth part, and

WHEREAS, the party of the first part is a holder of record on the books of the said corporation of thirty (30) shares of the common stock hereof, and

WHEREAS, the party of the second part is the holder of record on the books of the said corporation of (60) shares of the common stock thereof, and

WHEREAS, each of the parties of the first and second parts are desirous of selling, assigning and transferring unto the

party of the third part one-half of their respective holdings in the said corporation in accordance with the terms and conditions of the within agreement and in the manner as hereinafter mentioned, and

WHEREAS, the party of the third part is desirous of making the purchase of aforesaid, and

WHEREAS, the parties of the first, second and third parts are desirous of conducting the affairs of the said corporation during and pending the payments to be made for the said shares of stock by the party of the third part to the parties of the first and second parts, and also after full payment is made therefor, more particularly in accordance with the terms and conditions of this agreement,

NOW, THEREFORE, in consideration of the sum of ONE DOLLAR, each to the other in hand paid, receipt whereof is hereby acknowledged upon the signing of this agreement, and in consideration of the mutual promises and covenants hereinafter set forth, it is agreed herein as follows:

1. The parties of the first and second parts do hereby agree to sell, assign and transfer unto the party of the third part one-half of the common stock now owned and held by the parties of the first and second parts in L. & B. REINER, INC., the party of the fourth part, namely to the extent of forty-five (45) shares, same being one-half of the total number of shares held by them, for the sum of $190,000.00 payable in the manner as follows:

$50,000.00 by the party of the third part paying to the party of the first part the sum of $16,666.66 and to the party of the second part the sum of $33,333.34 as evidenced by four checks of even date, receipt of which sum is hereby acknowledged by the parties of the first and second parts upon the signing of this agreement;

$140,000.00 by the party of the third part executing and delivering to the party of the first part upon the execution of this agreement, ten promissory notes, as follows:

DUE	AMOUNT
October 1, 1949	$7,466.66
October 1, 1950	7,186.66
October 1, 1951	6,906.66
October 1, 1952	6,626.66
October 1, 1953	6,346.66
October 1, 1954	6,066.66
October 1, 1955	5,787.66
October 1, 1956	5,506.66
October 1, 1957	5,226.66
October 1, 1958	4,946.66

The party of the third part shall further execute and deliver to the party of the second part upon the execution of this agreement, ten promissory notes as follows:

DUE	AMOUNT
October 1, 1949	$14,933.33
October 1, 1950	14,373.33
October 1, 1951	13,814.33
October 1, 1952	13,253.33
October 1, 1953	12,693.33
October 1, 1954	12,133.33
October 1, 1955	11,573.33
October 1, 1956	11,012.33
October 1, 1957	10,453.33
October 1, 1958	9,893.33

It is agreed that the aggregate of all of the aforementioned notes given as above stated exceed the sum of $190,000.00 aforementioned, because the same already includes interest at the rate of 6% per annum.

2. (a) The first and second parties have this day surrendered to the corporation their certificates of stock numbered 1 to 4 inclusive. In exchange for same, the corporation has this day issued to the party of the first part certificates Nos. 5 and 6, each certificate representing fifteen (15) shares of stock and the corporation has this day issued to the party of the second part certificates Nos. 7 and 8, each certificate representing thirty (30) shares of the capital stock of the corporation.

(b) The first party has this day transferred and assigned to the third party certificate No. 5 representing fifteen (15) shares of the capital stock of the corporation and the third party has this day assigned and transferred to LEON REINER, the said certificate No. 5, which is to be held in escrow by the first party as collateral security for the payment of the balance of the purchase price, pursuant to the terms and conditions of this agreement. Said certificate to bear the statement: *"Subject to a written agreement between the parties hereto of even date."*

(c) The second party has this day transferred and assigned to the third party certificate No. 7 representing thirty (30) shares of the capital stock of the Corporation and the third party has this day assigned and transferred to BERTHA REINER, the said certificate No. 7 which is to be held in escrow by the second party as collateral security for the payment of the balance of the purchase price, pursuant to the terms and conditions of this agreement. Said certificate to bear the statement: *"Subject to a written agreement between the parties hereto of even date."*

3. (a) Upon payment of the promissory notes heretofore mentioned, then the first and second parties shall deliver to the third party the said certificates Nos. 5 and 7 respectively, and the assignment and transfer of said certificate to them

respectively by the third party, shall become null and void and of no effect.

(b) In the event that there is a default in the payment of any one of the aforesaid series of promissory notes herein mentioned and should said default continue for fifteen (15) days, then in such event all the other notes shall immediately become due and payable at the option of the holder thereof, and the assignment and transfer of the shares of the certificates of stock aforesaid to the parties of the first and second parts respectively shall become effective and operative and the shares of stock as evidenced by the said certificates shall become the property of the parties of the first and second parts without any allowance whosoever to the party of the third part for any payment or payments made by him in connection with such notes.

4. The parties of the first and second parts as directors of L. & B. REINER, INC., provided the payments are made pursuant to the promissory notes hereinbefore provided, shall at a meeting or meetings of the Board of Directors vote as follows:

a. To elect:

LEON REINER, as President
BERTHA REINER, as Secretary and Treasurer
HARRY MELTSNER, as Vice-President
ISADORE D. BLUMENTHAL, as Executive Vice-President

b. That all checks of the corporation shall be signed by either LEON REINER, as President or HARRY MELTSNER, as Vice-President, except when a check is payable to either one of them, then both signatures shall appear thereon.

c. The minutes to contain a resolution to the effect that LEON REINER shall act as General Manager, BERTHA

REINER as assistant manager, HARRY MELTSNER, as Sales Manager, and ISADORE D. BLUMENTHAL, as Executive Vice-President. The salary of LEON REINER shall be at the rate of $20,000.00 per year payable in equal monthly installments at the end of each and every month. The salary of BERTHA REINER shall be the rate of $12,000.00 per year payable in equal monthly installments at the end of each and every month, the salary of HARRY MELTSNER shall be at the rate of $20,000.00 per year, payable in equal monthly installments on the last day of each and every month, and the salary of ISADORE D. BLUMENTHAL shall be at the rate of $12,000.00 per year payable in equal monthly installments on the last day of each and every month. The minutes shall furthermore, contain a resolution in effect that in view of the smallness of the salary of the aforementioned employees, the corporation will at the end of each corporate fiscal year pay a bonus to each one of the aforesaid employees based upon the gross sales and net profits made during the said fiscal year, the first bonus shall be paid shortly after September 30, 1949, for the fiscal year ending on that date.

5. It is agreed that upon the full payment of the sum of $190,000.00 with interest, the party of the second part shall immediately resign as a director of the corporation and that the party of the third part shall be thereafter elected as a director in her place and that the officers of the corporation during the time that the parties of the first, second and third parts are stockholders shall be as follows:

President:	LEON REINER
Secretary-Treasurer:	BERTHA REINER
Vice-President:	HARRY MELTSNER
Executive Vice-President:	ISADORE D. BLUMENTHAL

6. It is agreed that should either one of the parties of the first, second or third parts desire to sell or transfer his or her shares of stock in the corporation, then and in that event, such offer of sale, assignment or transfer must be made in writing by registered mail to the other stockholder or stockholders and he or they shall have the right to purchase the same at a price to be mutually agreed upon. However, if such price cannot be agreed upon within thirty days from the date of the offer, then and in that event, the price for such shares of stock shall be fixed by three arbitrators. The stockholder offering to sell his stock shall name one arbitrator, and the two remaining stockholders shall name the other arbitrator, and the two arbitrators named shall in turn choose a third arbitrator, and the said arbitrators shall decide by a majority vote as to the price to be paid for said shares of stock. The arbitration shall be held in the City of New York. The parties of the first, second and third parts hereby agree to abide by the decision of the arbitrators and each waive their rights to take legal measures of any kind or nature, except to enforce the award which shall be final. The parties of the first and second parts if desiring to sell shall offer their shares of stock for sale as one unit and shall not be entitled to offer the same separately.

7. It is understood and agreed that the corporation shall pay premium for life insurance to the extent of $24,000.00 on the life of HARRY F. MELTSNER and the beneficiary of said insurance shall be his wife, if living, if not, to children equally. It is further understood that in the event of the death of the party of the first part then and in that event the salary of BERTHA REINER, as assistant manager shall be at the rate of $12,000.00 per annum payable in equal monthly installments at the end of the month for a period of two years after the death of said party of the first part and

thereafter her salary as such assistant manager shall be at the rate of $5,000.00 per annum payable in equal monthly installments, at the end of the month, and the minutes of the corporation shall contain a resolution to effectuate the aforesaid salary. In the event of the death of the party of the second part, then and in that event the salary of the party of the first part as general manager shall be the additional sum of $12,000.00 per annum payable in equal monthly installments at the end of the month and such salary shall continue as long as he is employed by the corporation, and the minutes of the corporation shall contain a resolution to effectuate the aforesaid salary.

8. It is agreed that the parties of the first and second parts as general manager and assistant manager respectively shall devote as much time to the business of the corporation as they in their own discretion and judgment shall deem necessary or advisable.

9. It is agreed however, that HARRY F. MELTSNER as sales manager shall devote all his time and attention to the business of the corporation.

10. It is agreed that if any dispute arises between the parties of the first and second parts and the party of the third part with respect to the terms, conditions or provisions of this agreement, then and in that event such dispute shall be decided by arbitration. The parties of the first and second parts shall choose one arbitrator and the party of the third part shall choose another arbitrator and the two such chosen arbitrators shall pick a third and any decision rendered by such arbitrators by a majority vote shall be binding upon the said parties shall be final and the said parties shall not resort to litigation of any kind or nature. The arbitration shall proceed expeditiously and shall take

place in the City of New York. It is understood and agreed, however, that anything to the contrary herein notwithstanding that this provision with respect to arbitration shall not apply in any form, shape or manner with respect to the payments to be made herein pursuant to the promissory notes to be executed and delivered by the party of the third part to the parties of the first and second parts, and the parties of the first and second parts shall have the right to take any action or proceeding that they may deem fit or advisable for the purpose of collecting the moneys due on the said promissory notes, and it is further agreed that this arbitration provision shall not apply in any form, shape or manner with respect to the reversion of the shares of stock to be sold herein to the party of the third part in the event of a default with respect to any one or all of the promissory notes hereinbefore mentioned.

11. It is agreed that neither one of the parties of the first, second or third parts shall at any time sell, assign, transfer, set over, pledge or otherwise deal with or encumber the whole or any part of his or her stock of the corporation owned by said parties without first allowing the other said parties or party of purchasing the same in accordance with the provisions of this agreement.

12. The parties of the first and second part hereby consent to the sale, assignment and transfer to HARRY F. MELTSNER, of one-half of the shares of stock this day purchased by the party of the third part, subject to all the terms and conditions with respect to the escrow terms contained in this agreement provided, however, such sale, assignment and transfer is made on or before October 1st, 1949. If such sale, assignment and transfer is made to said HARRY F. MELTSNER then he shall enter into a written stockholder's agreement with the parties of the first, second and third

parts restricting the sale of the same to the same extent as provision made therefore in this agreement.

IN WITNESS WHEREOF the parties hereto have signed this agreement the date hereinbefore mention.

In presence of:

(s) M. B. Matzkin

(s) Leon Reiner
(s) Bertha Reiner
(s) Isadore D. Blumenthal

L. & B. REINER, INC.
By (s) Leon Reiner
President

PLAINTIFFS' EXHIBIT No. 3

Agreement Dated 23 January, 1951

AGREEMENT made this 23d day of January, 1951, by and between LEON REINER, 260 Paine Avenue, City of New Rochelle, New York, BERTHA REINER, 260 Paine Avenue, City of New Rochelle, New York, L. & B. REINER, INC., a domestic corporation, with its principal place of business at 139 East 23rd Street, Borough of Manhattan, City of New York (hereinafter called "Corporation") and ISADORE D. BLUMENTHAL, 1720 Dowd Road, City of Charlotte, State of North Carolina (hereinafter called "Blumenthal").

WITNESSETH:

The parties have heretofore executed an agreement among them dated October 1, 1948 providing, among other things,

for the sale by Leon Reiner and Bertha Reiner of forty-five (45) shares of the common stock of the Corporation to Blumenthal. The sum of $158,900.00, representing the balance of the purchase price thereof together with accrued interest, remains unpaid. The parties desire to modify and amend said agreement in accordance with the provisions hereinafter contained.

NOW, THEREFORE, the parties hereto do hereby mutually agree as follows:

1. (a) The agreement between the parties heretofore executed and dated October 1, 1948 is hereby terminated and cancelled and shall be void and of no further effect.

(b) All promissory notes executed by Blumenthal, pursuant to the terms of said agreement, shall be cancelled and returned to Blumenthal.

2. The sum of $158,900.00, representing the unpaid balance of the purchase price for forty-five (45) shares of the common stock of the Corporation sold by Leon Reiner and Bertha Reiner to Blumenthal pursuant to the terms of the aforesaid agreement, shall be paid as follows:

(a) Simultaneously with the execution of this agreement, Blumenthal will pay to Leon Reiner and Bertha Reiner jointly the sum of $25,000.00.

(b) Simultaneously with the execution of this agreement, Blumenthal will execute and deliver to Leon Reiner and Bertha Reiner two (2) promissory notes payable to their order with interest at three (3%) per cent per annum as follows: one note in the face amount of $10,000.00 payable on November 15, 1951 and one note in the face amount of $15,000.00 payable on November 15, 1952. Said notes shall provide that in the event the note first due is not paid

on its due date, then the second note shall forthwith become due and payable.

(c) In the event of a default in the payment of either of the aforesaid notes, Leon Reiner and Bertha Reiner jointly shall forthwith be deemed to have purchased the said forty-five (45) shares of stock now owned by Blumenthal in the same manner as if an offer to sell the same had been made by Blumenthal at the book value thereof. The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive. Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute any action at law or otherwise to enforce collection of same.

(d) The balance of $108,900.00 with interest at three (3%) per cent from the date hereof shall thereafter be payable only out of dividends paid on the corporate stock now owned by Blumenthal, corporate salaries and bonuses or any other sums, if any, that may become due or payable to Blumenthal from the Corporation. Blumenthal does hereby authorize the Corporation to pay over to Leon Reiner and Bertha Reiner jointly all such dividends, salaries and bonuses or any other sums, if any, that may become due and payable to him at any time on or prior to September 1, 1958, to be applied against said balance of $108,900.00 until the same, plus accrued interest at three (3%) per cent, has been fully paid and discharged. If any balance, as aforesaid, remains unpaid on September 1, 1958, Blumenthal does hereby sell, transfer and assign the forty-five (45) shares of the corporate stock now owned by him to Leon Reiner and Bertha Reiner jointly, the purchase price to be the amount of said balance which shall be credited in full payment of said balance and said shares shall be and become the sole property of Leon Reiner and Bertha Reiner without

any right of redemption thereto in Blumenthal with the same force and effect as if Blumenthal had offered the same for sale to Leon Reiner and Bertha Reiner at the amount of said balance and Leon Reiner and Bertha Reiner had accepted said offer.

(e) In the event of a dissolution or liquidation of the Corporation, any sums that may become due and payable as a result thereof on the shares of corporate stock now held by Blumenthal, are hereby assigned to Leon Reiner and Bertha Reiner jointly to apply against the balance of $108,500.00 with interest as aforesaid and only the surplus, if any, shall be delivered to Blumenthal.

3. Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum.

4. Blumenthal holds a corporate note payable to his order in the face amount of $10,000.00. Leon Reiner holds a note executed by Blumenthal to the order of Leon Reiner in the face amount of $10,000.00 and a corporate note in the face amount of $10,000.00 as reduced to $8,000.00 by payments. Simultaneously with the execution hereof, Blumenthal will surrender the aforesaid corporate note to the corporation and Leon Reiner will surrender to the corporation said note in the sum of $10,000.00 as reduced to $8,000.00 held by him and cancel and surrender to Blumenthal said $10,000.00 note. The Corporation will thereupon execute and deliver to Leon Reiner a note payable to his order on demand in the sum of $3,500.00 with interest at four (4%) per cent.

5. The parties intend to maintain the capital of the Corporation by reimbursing it for any losses sustained during each

fiscal year until September 1, 1958, thereby maintaining an adequate working capital. The parties also intend to make loans to the Corporation whenever the Corporation needs additional working capital. Such contributions shall be made in accordance with the respective interests of the individual parties as holders of the capital stock of the Corporation. Until September 30, 1951, Blumenthal shall not be required to make any such contributions and if during said period Leon Reiner and Bertha Reiner make such contributions to the Corporation, Blumenthal will at any time after September 30, 1951 and upon ten (10) days written notice forthwith reimburse Leon Reiner and Bertha Reiner for fifty (50%) per cent of any such contributions. Thereafter, each of the parties will pay to the Corporation their proportionate share of any loss sustained by the Corporation during any six month period of any fiscal year within fifteen (15) days after notification of the amount of said loss as determined by the corporate accountants. Such contributions when made shall constitute loans to the Corporation and be entered upon the books of the Corporation as such. In the event Blumenthal fails to pay to the Corporation the amount required by said notice within ten (10) days, the same shall be deemed an acceptance by Leon Reiner and Bertha Reiner of an offer by Blumenthal to sell his said shares in the same manner as if default was made pursuant to the provisions of Article "2(c)" hereof.

6. Until the full amount of the balance due hereunder by Blumenthal shall have been paid, Leon Reiner will continue as president and general manager of the Corporation and receive a salary of $15,000.00 a year payable monthly. Blumenthal and Bertha Reiner shall receive equal salaries in amounts fixed by the Board of Directors dependent upon the earnings of the Corporation.

7. Blumenthal will not sell, transfer, assign or enlien the forty-five (45) shares of the corporate stock now owned by him unless he shall first offer the same for sale to Leon Reiner and Bertha Reiner jointly, at such price as shall have been offered to Blumenthal by a bona fide offer of purchase. Such offer to sell shall be made to Leon Reiner and Bertha Reiner in writing. In the event of acceptance by Leon Reiner and Bertha Reiner of said offer to sell, closing shall be held within thirty (30) days after written notice of acceptance. Failing such bona fide offer of purchase at more than the book value of said stock, Leon Reiner and Bertha Reiner may purchase said stock at the said book value. At closing, if the stock is sold to Leon Reiner and Bertha Reiner, they shall credit against the purchase price any balance still due on the purchase price of said stock or on any of said notes executed by Blumenthal. If, however, said stock is sold, pursuant to the terms hereof, to persons other than Leon Reiner and Bertha Reiner, then the entire purchase price or so much thereof as is necessary to pay the unpaid balance still due under the provisions of article "2" hereof shall be paid to Leon Reiner and Bertha Reiner.

8. Book value shall be ascertained in accordance with approved and accepted methods of accountancy applicable to the type of business engaged in by the Corporation. In making such computation, the following, among other things, must be strictly adhered to:

(a) Make appropriate allowance for all liabilities of the Corporation, and an appropriate reserve for all bad debts and all unmatured and contingent liabilities, including, but not limited to, claims in litigation, or as to which litigation is threatened or prospective, and the legal and other expenses in connection therewith, Federal, State, Municipal or other taxes that may be im-

posed, or levied upon the Corporation and/or its right to do business and/or upon the earnings or profits thereof including a reserve for taxes on profits from the close of the last fiscal year to the end of any season not ending with the close of any fiscal year.

(b) Evaluate inventory at cost or market, whichever is lower.

(c) Trade marks, trade names, patents, copyrights, franchises, good will and other intangible property shall be deemed of no value unless paid for in cash, in which event, the actual amount paid in cash, shall be taken as the value.

(d) Accounts receivable shall be taken at the amounts carried on the books less an appropriate reserve for all discounts, returns and bad accounts.

(e) Furniture and fixtures shall be evaluated at cost less an appropriate reserve for depreciation and obsolescence.

9. The books and records of the Corporation shall be made available for study and analysis to a certified public accountant chosen by Blumenthal at least once during each fiscal year at such time as may be chosen by Blumenthal.

10. (a) Upon the death of either Leon Reiner or Bertha Reiner, the survivor of them shall have the sole right to purchase the stock of the deceased party.

(b) Upon the death of Blumenthal or the survivor of Leon Reiner and Bertha Reiner, the surviving individual parties shall have the option to purchase all but not a part only of the stock of the deceased party within thirty (30) days after receipt of notice of the appointment and qualification of the executor or administrator, or thirty (30) days after receipt of notice of the transfer of said shares of stock to the legatees (as the case may be); and upon the exercise of said option, said executor, administrator or legatees (as

the case may be) shall be required to sell said shares of stock to the surviving individual parties.

(c) In the event the surviving individual parties fail to exercise their options to purchase the stock of the deceased party as aforesaid, they shall at the request of the executor, administrator or legatees (as the case may be) forthwith call a special meeting of stockholders and directors of the Corporation for the purpose of dissolving and liquidating the Corporation and shall at said meeting vote all of their stock in the Corporation for an immediate dissolution and liquidation of said Corporation.

(d) The purchase price of each share of stock shall be the book value thereof, except that the purchase price of Blumenthal's shares shall be one-half (½) of the book value thereof and there shall be credited against said purchase price any balance still due to Leon Reiner and Bertha Reiner on account of the purchase price or on said notes delivered pursuant to the terms of this agreement. Payment shall be made in five (5) equal annual installments commencing with closing.

11. The parties acknowledge that except for the obligations created by this instrument neither of the parties have any obligations of any kind or sort to each other, and formal instruments of general release to that effect will be executed and exchanged.

12. The actions heretofore commenced by the service of summons in the Supreme Court of the State of New York, County of New York, entitled LEON REINER, Plaintiff, against ISADORE D BLUMENTHAL, Defendant, and BERTHA REINER, Plaintiff, against ISADORE D. BLUMENTHAL, Defendant, shall be discontinued and a stipulation to that effect shall be executed simultaneously herewith.

13. The certificates representing the stock of the Corporation owned and held by the parties hereto shall have a legend inscribed thereon that they are issued and held subject to and in accordance with the provisions of this agreement.

14. None of the provisions herein contained may be altered, changed, amended or modified during the term of this agreement in any manner other than by the consent of all the parties hereto in writing, nor shall any waiver by any party of the strict performance of any of the terms, conditions and provisions of this agreement constitute a waiver thereof for the future but shall be considered a waiver only in the particular instance, for the particular purpose, and at the time when and for which it is given.

15. Any and all notices required to be given under the terms of this agreement shall be sent by registered mail, return receipt requested, and addressed to the parties herein at their addresses set forth above, or at such other address as may be designated by the parties in writing to the other parties hereto.

16. This agreement shall be binding on the parties hereto, their heirs, executors, administrators and legatees.

IN WITNESS WHEREOF, the parties hereto have signed this agreement the day and year first above written.

(s) Leon Reiner

(s) Bertha Reiner

L. & B. REINER, INC.
By (s) Leon Reiner
President

(s) I. D. Blumenthal

PLAINTIFFS' EXHIBIT No. 1

Promissory Note for $10,000.00 Dated January 23, 1951 and Protest Entry

$10,000.00 January 23, 1951

On November 15, 1951, after date, I promise to pay to the order of Bertha Reiner and Leon Reiner Ten Thousand .....00/00 Dollars Payable at Commercial National Bank, Charlotte, N. C.

This note is No. 1 of a series of 2 notes; that upon the default in the payment of anyone of the notes the remaining notes shall immediately become due and payable without notice.

Interest at 3%.

Value received I. D. Blumenthal

No. 1 Due Nov. 15, 1951

The following words and figures were written on the face of the above note:

$10,246.67
Fee 1.50
———
$10,248.17

Charlotte, N. C. Nov. 16, 1951

Protest for Non Payment

O. W. Bush
Notary Public

Fee: $1.50

PLAINTIFFS' EXHIBIT No. 2

Promissory Note for $15,000.00 Dated January 23, 1951

$15,000.00 January 23, 1951

On November 15, 1952 after date I promise to pay to the order of Bertha Reiner and Leon Reiner Fifteen Thousand .....00/00 Dollars Payable at Commercial National Bank, Charlotte, N. C.

This note is No. 2 of a series of 2 notes; that upon the default in the payment of any one of the notes the remaining notes shall immediately become due and payable without notice.

Interest at 3%

Value received I. D. Blumenthal

No. 2 Due Nov. 15, 1952

PLAINTIFFS' EXHIBIT No. 4

Stipulation of Counsel Dismissing Action Dated January 23, 1951, Reiner v. Blumenthal, Supreme Court of New York

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the above entitled action be and the same is hereby discontinued without costs to either party.

Dated: New York, January 23, 1951.

Blumberg, Miller, Aberman & Singer
Attorneys for Plaintiff

Hays, Wolf, Schwabacher, Sklar & Epstein

PLAINTIFFS' EXHIBIT No. 5

Formal Release from Isadore D. Blumenthal to Leon Reiner and Bertha Reiner Dated January 23, 1951

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN,

Greeting: Know ye, that I, ISADORE D. BLUMENTHAL, residing at 1720 Dowd Road, Charlotte, North Carolina, and being over the age of 21 years, for and in consideration of the sum of One ($1.00) Dollar and other good and valuable considerations, lawful money of the United States to me in hand paid by LEON REINER and BERTHA REINER the receipt whereof is hereby acknowledged, have remised, released, and forever discharged and by these presents do for myself, my heirs, executors, and administrators and assigns, remise, release and forever discharge the said LEON REINER and BERTHA REINER, their heirs, executors, administrators, successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity, which against LEON REINER and BERTHA REINER, I ever had, now have or which I or my heirs, executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

There shall be excepted from this release all rights, liabilities, and obligations created by an instrument between Leon Reiner, Bertha Reiner, Isadore D. Blumenthal and L. & B. Reiner, Inc. Dated January 23, 1951.

This release may not be changed orally.

In Witness Whereof, I have hereunto set my hand and seal the 23rd day of January in the year one thousand nine hundred and fifty-one.

Sealed and delivered in the presence of

I. D. Blumenthal L.S.

PLAINTIFFS' EXHIBIT 5-A

ISADORE D. BLUMENTHAL

to

LEON REINER and
BERTHA REINER

GENERAL RELEASE

Blumberg, Miller, Aberman & Singer
Attorneys at Law
200 Fifth Avenue
New York, 10, N. Y.

STATE OF NEW YORK
of
COUNTY OF NEW YORK } ss.:

On the 23rd day of January in the year one thousand nine hundred and fifty-one before me personally came ISADORE D. BLUMENTHAL to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

(s) Harold R. Kaplan
Attorney and Counselor at Law
State of New York,
No. 30-7157675
Qualified in Nassau County
Cert. Filed with N. Y. Co. Clerk
Term Expires March 30, 1952

TESTIMONY OF DEFENDANT, I. D. BLUMENTHAL

[TR. P. 287]

A Let's make a new agreement and be fair about it, because there is nothing fair about this other agreement. * * *

* * *

[TR. P. 288]

A Finally he agreed. He wanted another $50,000.00. * * *

* * *

A He wanted another $50,000.00 cash; and so I came back here and I couldn't raise $50,000.00. * * *

* * *

A All I could raise was $25,000.00, so I went back to him, pleading with him that all I could raise was $25,000.00. He said "Well, give me two notes, one payable in a year for $10,000.00 and one payable in two years—not quite two years, because this was in January and the first note was due in November." * * *

* * *

[TR. PP. 381-382]

Q You said you had paid $100,000.00 on the stock to the Reiners?

A That's right.

Q That $100,000.00 would include the $25,000.00 we are now suing you for, wouldn't it?

A That's right.

Q So you have $100,000.00 in it when you pay the $25,000.00 on the notes?

A When I signed the notes, it's the same as —

Q As cash?

A As cash. That's right.

* * *

[TR. P. 383]

Q Let me ask you this question: You made a statement to the jury a moment ago that you had $100,000.00 invested in this business and that you regarded these $25,000.00 notes — the two notes totaling $25,000.00 — the same as cash?

A That's right.

* * *

[TR. P. 298]

THE COURT: Objection sustained.

(To the witness:) This money, if I get it correctly, was for the purchase of the stock in this corporation?

THE WITNESS: The $100,000.00?

THE COURT: Yes, sir.

THE WITNESS: Yes, sir.

* * *

[TR. P. 304]

Q Mr. Blumenthal, when the note, Plaintiffs' Exhibit No. 1, dated January 23, 1951, in the amount of $10,000.00 became due on November 15, 1951, did you pay that note or any part of it?

A No, sir.

Q In cash?

A No, sir.

Q Did you ever pay any interest on it?

A No, sir.

Q Have you ever paid anything in cash on the note, Plaintiffs' Exhibit No. 2, in the amount of $15,000.00 dated January 23, 1951?

A No, sir.

* * *

[TR. PP. 389-390]

MR. COOLEY: We have the contract of 1951 in evidence, your Honor.

THE COURT: Yes, sir.

MR. COOLEY: I want to ask him one question about it.

Q All promissory notes executed by Blumenthal pursuant to the terms of said agreement shall be cancelled and returned to Blumenthal. My question is: Were those notes returned to you?

MR. HELMS: We object.

THE COURT: Overruled.

MR. COOLEY: It's out of the contract.

THE COURT: (To the witness:) He is asking you if those original notes of 1948 were returned to you and destroyed or —

THE WITNESS: Yes, sir.

THE COURT: All right, sir.

* * *

[TR. P. 355]

MR. HELMS: Just a minute. Let him answer.

A As a matter of fact, I paid $190,000.00 for the stock, and when they got through--Mr. Matzkin and Mr. Reiner —adding the interest, it was $248,000.00. They added the interest compounded 6% interest. So if I told this man who wanted to buy some stock and we agreed that we would sell him stock it was worth $200,000.00, I was telling him fair and square. What did you bring it up for?

Q Because I wanted to show that you yourself thought it was worth $200,000.00 at that time.

A Well, I paid $190,000.00 for it.

Q You obligated yourself to pay that.

A I paid it.

* * *

Leon Reiner

REDIRECT

[TR. P. 476]

BY MR. COOLEY:

Q Mr. Helms asked you about whether or not you had tried to sell or had sold any of the stock in the L. & B. Reiner Corporation since the default, and you answered that you

had not. I will ask you if you have sold or attempted to sell at any time any of the promissory given to you and your wife by the defendant Mr. Blumenthal?

A Never.

JUDGMENT TENDERED BY PLAINTIFFS AND REFUSED

This action came on for trial before the court and a jury, Hon. Wilson Warlick, presiding, and the issues were duly tried, and the jury, on October 11, 1956, under the direction of the Court, rendered a verdict that the plaintiffs recover nothing of the defendant, and the Court rendered a judgment in accordance with the directed verdict that the plaintiffs have and recover nothing of the defendant and pay the court costs to be taxed herein; and the Court also in said judgment dismissed the defendant's counterclaims No. 1, No. 2 and No. 3. To so much of the judgment as adjudicated that the plaintiffs have and recover nothing and pay the costs, the plaintiffs excepted. Within 10 days after said judgment was entered the plaintiffs filed a motion to set aside the verdict and the judgment entered thereon and to enter judgment n.o.v. in accordance with plaintiffs' motion for directed verdict during the course of the trial that they have and recover of the defendant the amounts due on two promissory notes, together with interest.

This cause came on to be heard at Charlotte, N. C., on December 14, 1956, on the plaintiffs' motion to set aside the verdict and judgment, and for judgment n.o.v. in accordance with their previous motion for directed verdict; and the Court having heard the argument of counsel and being fully advised, it is

ORDERED:

That the verdict and so much of the judgment dated Oct. 11, 1956, as adjudicates that the plaintiffs have and recover nothing of the defendant and pay the Court costs, be set aside and vacated.

It is further ordered and adjudged that the plaintiffs Leon Reiner and Bertha Reiner recover of the defendants, Isadore D. Blumenthal, who resides in the City of Charlotte, County of Mecklenburg, State of North Carolina, the sum of $25,616.68 due November 15, 1951, being the sum of $25,000 with interest thereon at the rate of 3% per annum from Jan. 23, 1951 to Nov. 15, 1951; and the additional sum of $7,834.44, being interest on said sum due November 15, 1951 at the rate of 6% per annum from Nov. 15, 1951, to the date of this judgment, Dec. 20, 1956, as damages, total $33,451.12, with interest thereon at the rate of 6% per annum from the date hereof until paid, and their costs of action.

So much of the judgment entered Oct. 11, 1956 as denies the defendant's right to relief on his several counterclaims, is not disturbed by this judgment.

Dated December 20, 1956.

.....

United States District Judge

FEW:S

JUDGMENT SIGNED BY THE COURT DATED JANUARY 28, 1957

This action came on for trial before the court and a jury, Hon. Wilson Warlick, presiding, and the issues were duly tried, and the Jury, on October 11, 1956, under the direction of the Court, rendered a verdict that the plaintiffs have and

recover nothing of the defendant and pay the court costs to be taxed herein; and the Court also in said judgment dismissed the defendant's counterclaims No. 1, No. 2 and No. 3. To so much of the judgment as adjudicated that the plaintiffs have and recover nothing and pay the costs, the plaintiffs excepted. Within 10 days after said judgment was entered the plaintiffs filed a motion to set aside the verdict and the judgment entered thereon and to enter judgment n.o.v. in accordance with plaintiffs' motion for directed verdict during the course of the trial that they have and recover of the defendant the amounts due on two promissory notes, together with interest.

After due notice, the motion was heard at Charlotte, N. C. on December 14, 1956.

The Court, having heard the argument of Counsel for both sides, and being fully advised, filed its memorandum decision on December 20, 1956, granting plaintiffs' motion, entering a verdict for plaintiffs for $25,000.00, interest and costs, and directing counsel to submit a decree.

It is now ORDERED and ADJUDGED that the plaintiffs, Leon Reiner and Bertha Reiner, recover of the defendant, Isadore D. Blumenthal, who resides in the City of Charlotte, County of Mecklenburg, State of North Carolina, the sum of $25,000.00, with interest thereon from January 23, 1951, at the rate of 3% per annum until the date of this judgment, $4,510.25, aggregating as of this date the sum of $29,510.25 with interest on the latter sum at the rate of 6% per annum from the date hereof until paid, and their costs of action.

So much of the judgment entered October 11, 1956 as denies the defendant's right to relief on his several counterclaims, is not disturbed by this judgment.

Dated at Charlotte, North Carolina this 28th day of January, 1957.

(s) Wilson Warlick
United States District Judge

OBJECTIONS AND EXCEPTIONS OF PLAINTIFFS

Prior to the entry of Final Judgment 28 January 1957, the plaintiffs made the following objections to the judgment as signed:

On December 20, 1955, the Court entered a verdict for plaintiffs for $25,000.00, interest and costs, and directed counsel to submit a decree. In accordance with said direction, plaintiffs' counsel, on December 29, 1955, tendered to the Court a judgment that they recover $25,000.00, with interest at the rate of 3% per annum from January 23, 1951, the date of the Notes, to November 15, 1951, when defendant defaulted in payment ($25,616.66), with interest on the latter sum at 6% per annum from November 15, 1951 to December 20, 1956 ($7,834.44), as damages for default, with interest on this total sum of $33,431.12 at the rate of 6% per annum from December 20, 1956, until paid, and their costs of action. This Judgment the Court declined to sign, to which the plaintiffs excepted, and directed counsel to draw a Judgment for $25,000.00, with interest at the rate of 3% per annum until the date of the Judgment, and directed that said Judgment be tendered to the Court on Monday, January 28, 1957.

After the entry of Final Judgment, the plaintiffs renewed their objection and exception to the decision of the Court that the plaintiffs were not entitled to interest as set forth in the Judgment tendered by them and refused.

Let this statement of the plaintiffs' objections and exceptions be made a part of the record in this cause.

This the 28th day of January, 1957.

(s) Wilson Warlick
United States District Judge
for the Western District of
North Carolina

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 569

ISADORE D. BLUMENTHAL,

Petitioner,

v.

LEON REINER AND WIFE, BERTHA REINER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

MAURICE A. WEINSTEIN,
FRED B. HELMS,
Attorneys for Petitioner
1502 Liberty Life Building
Charlotte 2, North Carolina.

WILLIAM H. BOBBITT, JR.,
Of Counsel.

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(A) The judgment of the United States Court of Appeals for the Fourth Circuit deprived the petitioner, defendant-appellant below, of his right to trial by jury, as preserved by the Seventh Amendment to the Constitution of the United States, by affirming a judgment of the District Court wherein the Judge of the District Court granted the motion of the respondents, plaintiffs-appellees below, for judgment notwithstanding the verdict of the jury, where the evidence in favor of the defendant-appellant below was such that the Judge of the District Court had peremptorily instructed the jury to render, and the jury accordingly had rendered a verdict in favor of the petitioner, defendant-appellant below, and where there was substantial evidence in behalf of the petitioner, defendant-appellant below, which clearly raised jury issues.

(B) The judgment of the United States Court of Appeals for the Fourth Circuit, in affirming the judgment of the District Court, condoned the forfeiture of corporate stock pledged as collateral, such decision being in conflict with applicable and established state law and in conflict with the law established by the United States Courts of Appeals of other circuits, and did such judgment thereby depriving the petitioner, defendant-appellant below, of his property without due process of law, in that the Court below failed to apply the established "law of the land".

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IN THE
OCTOBER TERM, 1957

No.....

ISADORE D. BLUMENTHAL, *Petitioner*

versus

LEON REINER AND WIFE, BERTHA REINER, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In accordance with the provisions of Rule 23 of the Revised Rules of the Supreme Court of the United States, Isadore D. Blumenthal, petitioner, defendant-appellant below, does hereby petition the Supreme Court of the United States for writ of certiorari to the United States Court of Appeals for the Fourth Circuit in the foregoing case, and in support of such petition, presents the following:

I. — Opinion Below —

The official report of opinion was filed by the United States Court of Appeals for the Fourth Circuit on the 19th day of July, 1957, entitled as follows:

No. 7422

Isadore D. Blumenthal, Appellant

versus

Leon Reiner and wife, Bertha Reiner, Appellees

No. 7382

Isadore D. Blumenthal, Appellant

versus

Leon Reiner and wife, Bertha Reiner, Appellees.

At the time of preparation of this petition the opinion had not appeared in the unofficial reports.

The opinion of the Court below appears in the Appendix hereto at page 35.

II. Grounds of Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked on the following grounds:

A. The judgment sought to be reviewed is dated and was entered by the United States Court of Appeals for the Fourth Circuit on the 19th day of July, 1957.

B. Petition for rehearing was filed with the United States Court of Appeals for the Fourth Circuit on the 17th day of August, 1957, which petition for rehearing was denied by order of said Court entered and filed on the 18th day of September, 1957.

C. The statutory provision which confers jurisdiction upon the Supreme Court of the United States to review the aforesaid judgment by writ of certiorari is Title 28 U.S.C.A. 1254, June 25, 1948, c. 646, 62 Stat. 938, which provides, inter alia, as follows:

"Courts of Appeals; Certiorari; Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree: - - -,"

III. Questions Presented for Review

The questions presented for review are:

A. Did the judgment of the United States Court of Appeals for the Fourth Circuit deprive the petitioner, defendant-appellant below, of his right to trial by jury, as

preserved by the Seventh Amendment to the Constitution of the United States, by affirming a judgment of the District Court wherein the Judge of the District Court granted the motion of the respondents, plaintiffs-appellees below, for judgment notwithstanding the verdict of the jury, where the evidence in favor of the defendant-appellee below was such that the Judge of the District Court had peremptorily instructed the jury to render, and the jury accordingly had rendered a verdict in favor of the petitioner, defendant-appellant below, and where there was substantial evidence in behalf of the petitioner, defendant-appellant below, which clearly raised jury issues?

B. Did the judgment of the United States Court of Appeals for the Fourth Circuit, in affirming the judgment of the District Court, condone the forfeiture of corporate stock pledged as collateral, and is such decision in conflict with applicable and established state law and in conflict with the law established by the United States Court of Appeals of other circuits, and did such judgment thereby deprive the petitioner, defendant-appellant below, of his property without due process of law, in that the Court below failed to apply the established "law of the land"?

IV. Constitutional and Statutory Provisions Involved

The constitutional provisions involved are:

A. Due Process of Law.

Article V of the Amendments to the Constitution of the United States which provides:

> "No person shall . . . be deprived of life, liberty, or property without due process of law . . ."
>
> (U.S.C.A. Const. Amendment V)

B. Trial by Jury.

Article VII of the Amendments to the Constitution of the United States, which provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."
(U.S.C.A. Const. Amendment VII)

C. State Laws as Rules of Decision.

"The laws of the several states, except where the Constitution or Treaties of the United States, or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

(Title 28, U.S.C.A. 1652, June 25, 1948,
c. 646, 62 Stat. 944)

V. Statement of the Case

This is an action instituted in the District Court of the United States for the Western District of North Carolina, Charlotte Division, by the plaintiffs, Leon Reiner and wife, Bertha Reiner, of New York City, the respondents herein, against the defendant, Isadore Blumenthal, of Charlotte, North Carolina, the petitioner herein, for the recovery of $25,000.00 and interest. (Complaint, Defendant's Appendix 1)

This action arises out of a written contract between the plaintiffs and the defendant, dated the 1st day of October, 1948, as modified and amended by contract between the

parties, dated January 23, 1951, for the purchase by the defendant from the plaintiffs of 45 shares of stock in L & B Reiner, Inc., a purported New York corporation. The purchase price as set out in the original contract was $190,000.00. At the time of the execution of the original contract the defendant paid to the plaintiffs $50,000.00 cash. At the time of the execution of the modified and amended contract on January 23, 1951, the defendant paid to the plaintiffs the additional sum of $25,000.00 cash and executed two promissory notes in the face amount of $25,000.00. This suit is on the two notes.

Under both the original agreement and the modified and amended agreement the 45 shares of stock were retained by the plaintiffs as collateral security under the provisions set forth in the written agreements.

The defendant filed his answer denying the claim made by the plaintiffs and setting forth his denial of indebtedness and counterclaim for the recovery of the $75,000.00 cash theretofore paid to the plaintiffs upon the grounds (1) that the contracts were procured through fraud by the plaintiffs, and (2) upon total failure of consideration, or (3) in the alternative for the recovery of at least, $32,645.00, being the difference between the book value of the 45 shares of stock and the amount of the notes, all in accordance with paragraph 2(c) of the modified and amended agreement between the parties, dated January 23, 1951. (Defendant's appendix 5)

Counterclaims (1) and (2) are not involved in this petition. Counterclaim (3) is involved in this petition under question A with respect to deprivation of right to trial by jury.

Annexed to the answer filed by the defendant-appellant, the following appeared:

> "Pursuant to the Federal Rules of Civil Procedure, notice is hereby given that the defendant demands a trial by jury of all issues raised by the pleadings in the above case."

The modified and amended agreement of January 23, 1957 among others, contained the following provisions:

> "2. The sum of $158,000.00 representing the unpaid balance of the purchase price for forty-five (45) shares of the common stock of the corporation sold by Leon Reiner and Bertha Reiner to Blumenthal pursuant to the terms of the aforesaid agreement, shall be paid as follows:
>
> (a) Simultaneously with the execution of this agreement, Blumenthal will pay to Leon Reiner and Bertha Reiner jointly the sum of $25,000.00.
>
> (b) Simultaneously with the execution of this agreement, Blumenthal will execute and deliver to Leon Reiner and Bertha Reiner two (2) promissory notes payable to their order with interest at three (3%) per cent per annum as follows: one note in the face amount of $10,000.00 payable on November 15, 1951, and one note in the face amount of $15,000.00 payable on November 15, 1952. Said notes shall provide that in the event the note first due is not paid on its due date, then the second note shall forthwith become due and payable.
>
> (c) *In the event of a default in the payment of either of the aforesaid notes, Leon Reiner and Bertha Reiner jointly shall forthwith be deemed to have purchased the said forty-five (45) shares of stock now owned by Blumenthal in the same manner as if an offer*

to sell the same had been made by Blumenthal at the book value thereof. The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive, Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute any action at law or otherwise to enforce collection of same.

(d). *The balance of $108,900.00 with interest at three (3%) per cent from the date hereof shall thereafter be payable only out of dividends paid on the corporate stock now owned by Blumenthal, corporate salaries, and bonuses or any other sums, if any, that may become due or payable to Blumenthal from the corporation. . . . If any balance, as aforesaid, remains unpaid on September 1, 1958,* Blumenthal does hereby sell, transfer, and assign the forty-five (45) shares of the corporate stock now owned by him to Leon Reiner and Bertha Reiner jointly, the purchase price to be the amount of said balance . . . *without any right of redemption thereto in Blumenthal* . . .

3. Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum." (Defendant's appendix 20).

Pursuant to the terms of the modified and amended agreement of January 23, 1951, Blumenthal paid to the Reiners the sum of $25,000.00 and delivered two promissory notes in the total sum of $25,000.00. As noted above, Blumenthal paid the Reiners $50,000.00 on October 1, 1948, thereby making the total paid on the stock the sum of $75,000.00.

The due date of the first of the two notes was November 15, 1951. Prior to that time, Blumenthal notified the Reiners

that the notes would not be paid in cash. On November 15, 1951, the due date of the first note, the Reiners declared that the second of the two notes was also due under the contract, and the Reiners further declared that they were henceforth the owners of the 45 shares of capital stock and that same had been forfeited pursuant to paragraph 2(c) of the contract of January 23, 1951. Defendant's appendix 72 to 74).

At the trial, it was stipulated that the book value of all ninety shares of the stock on November 15, 1951, was the sum of $111,899.40, and that the book value on said date of the 45 shares of the capital stock of the corporation purportedly issued to Blumenthal was $55,949.70. (Defendant's appendix 74).

Blumenthal contended that when the Reiners declared that the 45 shares of capital stock was forfeited to them, that same constituted a purchase by the Reiners at the book value of $55,949.70, and that the $25,000.00 due on the notes should be credited against said amount of book value of the stock, and the difference or balance paid to Blumenthal as alleged in the third counterclaim.

The corporation never declared and never paid any dividend whatsoever. (R.p. 105). The corporation never paid any salary, bonus or any remuneration whatsoever to Blumenthal. The corporation never paid to Blumenthal any expenses advanced by him. (R.p. 108, defendant's appendix 70).

Prior to trial, the plaintiffs filed motion for jugdment on the pleadings, which motion was denied. The plaintiffs there-

after filed motion for summary judgment, which was likewise denied, the District Judge stating:

> "There have been all sorts of motions and I have overruled them all. I am going to let the jury hear the matter."

Towards the conclusion of four days of trial the Judge of the District Court stated:

> "The Court makes this ruling for that the Court is of the opinion that the matter is one entirely for the jury and thereupon puts it to the jury with that thought in mind under the issues found in the record." (R.p. 538)

With reference to the meaning of paragraph 2(c), the defendant-appellant testified that it was his understanding, "that those notes would be paid and he would pay me for my stock $59,000 ($55,494.70), the book value, and we would just call it a day. (Defendant's appendix 95). And further, "I agreed to take book value $59,000.00 ($55,-949.70), and he agreed to pay me, and with that I paid those $25,000.00 notes." (Defendant's appe : 91). At that point in the trial, the Trial Judge stated: "I will leave it to the jury to construe but he says that is his understanding of the matter and he would be entitled to state that."

It is significant that such understanding was never denied nor refuted by the plaintiffs-appellees at the trial.

The Judge of the District Court submitted two issues to the jury:

(1) "Did the defendant execute the two notes, one in the sum of $10,000.00 and the other in the sum of $15,-

000.00, each dated January 23, 1951, as alleged in the complaint? At the time of the charge to the jury, the District Judge stated: "I have written down there that it is answered yes, by consent, because all parties agree that he did."

(2) "In what amount, if any, is the defendant indebted to the plaintiffs as alleged in the complaint?" On the second issue, in the charge to the jury, the District Judge stated:

> "I have given this matter considerable thought. I am of the opinion, at least in my own mind, that my interpretation of this contract is correct. I have had the benefit of especially fine argument from fine legal minds with respect to their thought and from studies that they have made and from cases that they have found and interpreted, and I have come to this conclusion. In interpreting this contract on this date, October 11, 1956, as against the time when it was made on January 23, 1951, that when the defendant Blumenthal failed in November of 1951 to pay the first note of $10,000.00 that the plaintiffs had the right to accelerate the $15,000.00 note . . .; and that then, under the terms of the contract, that they had the right and they were deemed to have purchased the 45 shares of stock that was then owned by Blumenthal in the same manner as if he, Blumenthal, had offered to sell the same to them at the book value, which admittedly was $55,949.70; and that when they did that, as the evidence tends to show they did . . . that then, having done that, they then agreed to pay the sum of $55,949.70 for the taking over of that particular 45 shares of stock; and I instruct you that if you find such facts to be from the evidence and by its greater weight, the burden being on the defendant, that the defendant would then be in law entitled to have his notes credited in full with so much of the $55,000 as it took to exonerate him from further liability of responsibility under those two notes, and having so done that, it would be your duty, and I instruct you peremptorily as a matter of law that it is your duty

and responsibility to answer that second issue, "nothing". (R.p. 557, 559, Defendant's appendix 63).

The jury rendered the unanimous verdict of "nothing" on the second issue and judgment was entered accordingly on October 11, 1956. (Defendant's appendix 35).

The defendant submitted an issue based upon the third counterclaim, as follows:

> "Should the surplus of the purchase price at book value of the 45 shares of stock issued to the defendant, over the credit on the two notes, be paid to the defendant?"

The Court refused to submit the above issue to the jury, to which the defendant excepted. The defendant requested the following instructions upon the above issue based upon the third counterclaim:

> "If the jury, by the greater weight of the evidence, find the facts to be as all the evidence tends to show, the jury will answer that issue: Yes."

The Court refused to give the above instruction, to which the defendant excepted.

Within apt time, after reception of the verdict and on October 16, 1956, the plaintiffs filed a motion for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure. Approximately two months later, on December 20, 1956, the Judge of the District Court rendered a memorandum decision to the effect that he was setting aside the verdict and the judgment entered on Octo-

ber 11, 1956, in favor of the defendant, and would enter judgment in accordance with the motion of the plaintiffs for a directed verdict in favor of the plaintiffs. (Defendant's appendix 37). The defendant objected and excepted. (Defendant's appendix 47).

Accordingly, on January 28, 1957, judgment notwithstanding the verdict of the jury was entered in favor of the plaintiffs and against the defendant. (Defendant's appendix 49). The defendant objected and excepted. (Defendant's appendix 51).

The defendant-appellant appealed to the United States Court of Appeals for the Fourth Circuit from the judgment notwithstanding the verdict, being Case No. 7422 before the Circuit Court. The defendant-appellant also appealed to said Circuit Court from the order of the District Judge dismissing the counterclaims, being Case No. 7382 before the Circuit Court.

The judgment of the District Court was affirmed by the United States Court of Appeals for the Fourth Circuit by opinion filed on July 19, 1957.

The result of the judgment of the District Court and the affirmation by the United States Court of Appeals for the Fourth Circuit means that the plaintiffs-appellees will have received a total of One Hundred Thousand ($100,000.00) Dollars plus interest from the defendant-appellant in return for which the defendant-appellant has received nothing and will never receive anything.

VI. Basis of Federal Jurisdiction

The basis for federal jurisdiction in the court of first instance, namely, the United States District Court for the

Western District of North Carolina, was diversity of citizenship, pursuant to Article III, Section 2(1) of the Constitution of the United States, the plaintiffs-appellees being residents of the State of New York, and the defendant-appellant being a resident of the State of North Carolina, the amount in controversy being in excess of $3,000.00 exclusive of interest.

VII. Reasons for Granting the Writ

The writ of certiorari should be allowed in the present case because:

(a) The judgment of the United States Court of Appeals for the Fourth Circuit deprived the petitioner, defendant-appellant below, of his right to trial by jury as preserved by the Seventh Amendment of the Constitution of the United States, by affirming a judgment of the District Court wherein the Judge of the District Court granted motion of the respondent, plaintiffs-appellees below, for judgment notwithstanding the verdict of the jury, where substantial evidence in behalf of the petitioner, defendant-appellant below, raised jury issues and where the evidence was in fact such that the Judge of the District Court peremptorily instructed the jury to render, and the jury accordingly rendered, a verdict in favor of the petitioner, defendant-appellant below. Accordingly, the Court below has decided a federal question of unusual gravity and general importance in conflict with the applicable decisions of this Court, and in conflict with decisions of other courts of appeals, and has so far departed from the accepted course of judicial proceedings as to call for this Court's power of supervision.

(b) The judgment of the United States Court of Appeals for the Fourth Circuit, in affirming the judgment of

the District Court, condoned the forfeiture of corporate stock pledged as collateral, such decision being in conflict with applicable and established state law, and in conflict with law established by other courts of appeals, thereby depriving the petitioner, defendant-appellant below, of property without due process of law in that the Court below failed to apply the established "law of the land".

ARGUMENT

The following argument is presented to amplify the aforesaid reasons for allowance of the writ:

A. THE DECISION OF THE COURT BELOW DEPRIVES THE PETITIONER OF HIS RIGHT TO TRIAL BY JURY.

The Judge of the District Court did not have the right, under the evidence and the existing law, to grant the motion for judgment notwithstanding the verdict of the jury. The Judge of the District Court on account of the overwhelming evidence in favor of the petitioner had peremptorily instructed the jury to answer the second issue "Nothing", which was a finding on the part of the Judge that there was no substantial evidence to support recovery by the Plaintiffs, and that there was overwhelming evidence before the Court in behalf of the cause of the defendant. *We have been unable to find a reported case from any jurisdiction, either state or federal, where a trial judge has granted a motion for judgment notwithstanding the verdict after having previously given a peremptory instruction or a directed verdict in favor of the opposing party.*

The test of when a jury trial is required under the Seventh Amendment was well stated by Mr. Justice Black in

the case of *Tiller* vs. *Atlantic Coastline R. R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, wherein it was stated:

> *"Where the facts are in dispute and the evidence in relation to them is that from which fair-minded men may draw different inferences, the case should go to the jury."*

The standard to be followed on a motion for judgment notwithstanding the verdict are clear. Chief Judge Parker, in the case of *Burcham* v. *J. P. Stevens Co.*, 209 F. 2d 35, (C.C.A. 4th) stated:

> "It is well settled that on a motion for a directed verdict, or on motion for judgment non obstante veredicto based on such motion, the evidence must be considered in the light most favorable to the party against whom the directed verdict or the judgment non obstante veredicto is asked, that any conflict in evidence must be resolved in his favor, and that every conclusion or inference that can be legitimately drawn therefrom in his behalf must be drawn. When this rule is applied here, we think that the case was one for the jury."

It should be noted that Chief Judge John J. Parker did not sit on the Court below when the case at bar was heard.

The above rule of law has also been stated by other United States Courts of Appeals. *O'Day* v. *Chicago River Railroad Co.*, 216 F. 2d 79, (C.C.A. 7th); *Audirsch v. Texas & Pacific Railway Co.*, 195 F. 2d 629 (C.C.A. 5th).

It is also significant to state that the petitioner presented numerous citations of authority from the decisions of the Fourth Circuit, from federal jurisdictions, and from this Court, in his briefs filed with the Court below, and in oral argument. It is noted that the opinion of the Court below

fails to cite, let alone distinguish or overrule, a single decision with respect to the petitioner's claim to the right of trial by jury.

In the case of *Tennant* vs. *Peoria Ry. Co.*, 64 S. Ct. 409, 321 U. S. 29, 88 L. Ed. 520, it was stated:

> "The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences, or conclusions, or because the Judges feel that other results are more reasonable."
>
> "Upon an examination of the record we cannot say that the inferences drawn by this jury that respondent's negligence caused the fatal accident is without proper support in evidence. *Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial.* No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

The opinion of the Court below summarily disposes of the petitioner's right to trial by jury in the following words:

> "The defendant argues that the terms of the agreement are ambiguous and therefore should have been submitted to the jury for their interpretation. We think, however, that the agreement is not ambiguous and agree with the position taken not only by the plaintiffs but by the defendant himself in the trial below, that the question was one to be determined by the Judge." (Appendix hereto p. 48)

The opinion of the Court below states that the agreement is "not ambiguous", yet in its opinion, the Court below refers

to and relies upon numerous matters of evidence outside the written agreement in reaching its conclusion as to the meaning of the agreement. The Court below opens some of its paragraphs as follows:

(a) "Such a result could not have possibly been contemplated by the parties."

(b) "Keeping these facts in mind, it is seen that the defendant's position is untenable."

(c) "The situation of the parties at the time of the settlement of January 23, 1951, as disclosed by the undisputed evidence, was such that the interpretation of the defendant cannot be reasonably entertained."

It is also noted that the Judge of the District Court in his opinion setting aside the judgment notwithstanding the verdict considered and relied upon numerous matters of evidence outside of the written agreement. (Defendant's appendix 47). It is also significant that a reading of the opinion of the Court below in comparison with a reading of the opinion rendered by the District Judge clearly indicates that both not only considered and relied upon numerous matters of evidence outside of the written agreement, but also that they arrived at their conclusions upon different grounds.

It was, obviously, necessary for the Court below and the District Judge to consider the evidence outside of the written agreement because any attempt to determine the meaning of the contract standing alone runs head-on into the conflict between the provisions in paragraph 2(c) and paragraph 2(d) of the agreement.

Paragraph 2(c) provides that Reiners "shall forthwith be deemed to have purchased the said 45 shares of stock . . .

at the book value thereof". The Reiners were deemed to have purchased the stock at the book value thereof, but no statement is made in the agreement as to how, when, or where the Reiners were to pay for the stock. *No statement is made in the agreement as to what shall be done with the proceeds of the sale of the stock.* Under paragraph 2(d) the purchase price of the stock was to be determined in an entirely different manner and the sum of $108,900 was not due until September 1, 1958, a time which has still not arrived. The sum under paragraph 2(d) was *"payable only out of dividends paid on corporate stock now owned by Blumenthal, corporate salaries, and bonuses, or any other sum, if any, that may become due and payable to Blumenthal."* The paragraph does not state that the proceeds of any sale of the stock under paragraph 2(c) shall be applied to the $108,900. At the time of the purchase of the stock by the Reiners, nothing was due on the $108,900 either from the source of funds or the time of payment.

Accordingly, standing alone, the agreement is ambiguous. The Trial Judge, during four days of trial, was also of the opinion that the contract was ambiguous, when he made the following statements:

> "The contract, in some ways is somewhat unfortunately worded; but I believe the jury can get what the parties had in mind. I think they can ultimately do that." (R.p. 249)

> "As I say, this contract looked at first like it was plain and simple as could be, but when the subsequent factors come about, then it creates a situation which calls for thinking, and *I have thought about it pretty hard myself, and I am in a quandary again."* (R.p. 513).

"Gentlemen, the only thing I am interested in now is to determine the issues and submit it to the jury." (R.p. 487).

"This is where he contends that the notes had been paid when the stock was carried over, *and I think the contract is ambiguous enough that it is a question for the jury to determine.*" (R.p. 489).

"I got back in chambers during the noon recess and carried this contract with me and began to read it again and to study its four corners, and *I declare to you it is a messed up thing. There is no doubt about that.*" (R.p. 232).

It has been well established as a general rule that interpretation of the meaning of a contract is a matter for the jury where its meaning is uncertain or ambiguous. *Kress* v. *Fisher*, 65 F. 2d 682 (C.C.A. 4th). The law is well stated in the case of *Floyd* v. *Ring Construction Corp.*, 165 Fed. 2d 125 (C.C.A. 8th), as follows:

"The law is that the terms of a contract, if it be ambiguous, are matters of fact to be determined in the same manner as other facts; by the jury, if it be a jury case, or by the court, if the jury be waived; while the construction of the contract and its legal effect are questions of law for the court."

And further, in the case of *C. H. Pope & Co., Inc.* v. *Bibb Mfg. Co.*, 290 F. 586 (C.C.A. 2), the Court stated:

"The jury's function in the construction of documents arises wherever, in view of the surrounding circumstances and usages offered in evidence, the meaning of the writing is not so clear as to preclude doubt by a reasonable man of its meaning." *Williston, Contracts 616.*

The above quotation from the opinion of the Court below states that the petitioner took the position in the trial below that the question was to be determined by the Judge. The Court seems to be taking the position that the petitioner waived his right to trial by jury. The petitioner demanded a trial by jury in his pleadings, understood throughout the trial that the jury was impaneled to hear and decide the issues that were involved, and did not waive his right to have his cause heard by that jury. The making of a motion for a directed verdict does not constitute a waiver of trial by jury. Rule 50 of the Federal Rules of Civil Procedure, states:

> *"A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts."*

There was no waiver of right to a jury trial by the petitioner. At the conclusion of all of the testimony, both sides prepared to argue to the jury, the Trial Judge stating, "Gentlemen, in the argument to the jury, the Plaintiffs will have both the opening and the conclusion." And the Trial Judge further stated: *"The Court is of the opinion that the matter is one entirely for the jury, and thereupon puts it to the jury with that thought in mind under the issues found in the record."* Approximately 12 times during the trial, the Judge of the lower court announced that the evidence and the proper construction of the contract were in favor of petitioner. (Rpp. 154, 155, 156, 157, 158, 159, 190, 214, 216, 240, 248, 249). (Defendant's appendix 69-70). Illustrative of such pronouncements is the following: "So I will hold, and I will instruct the jury on the evidence thus far at the proper time, that these parties owe Blumenthal $55,-949.70 against which he owes them $25,000.00 and interest, and that he would be entitled to have and recover of the

plaintiffs on his counterclaim such difference as there was between the $25,000.00 and the $55,000.00." (Defendant's appendix 69).

The petitioner, therefore, requested that the lower court so direct the jury or give a peremptory instruction to that effect. Doing so did not constitute a waiver of trial by jury nor consent by the petitioner that the Judge of the lower court could ever decide the questions at hand in favor of the respondents and without the intervention of the jury.

The right to trial by jury is a fundamental guarantee of the Constitution, and the courts indulge every reasonable presumption against its waiver. In the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, *in reversing a judgment notwithstanding the verdict*, the Supreme Court of the United States, Mr. Justice Van Devanter, speaking for the Court, stated:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . ."
>
> "It has been often said by this Court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. *Consequently, every reasonable presumption should be indulged against its waiver.* For these reasons the judgment below must be reversed."

Furthermore, in the instructions to the jury (Defendant's appendix 53), the Court, after reviewing the evidence, stated: "And I instruct you that if you find such facts to be from the evidence and by its greater weight, the burden being on the defendant, . . . it would be your duty, and I instruct you peremptorily as a matter of law, that it is

your duty and responsibility to answer that second issue; 'Nothing'." The jury responded with a verdict of "Nothing", thereby indicating that they found the facts to support such verdict.

In its opinion the Court below proceeds in an attempt to speculate on what might have been the intentions of the parties. When an agreement is ambiguous, there is no better evidence of the intention of the parties than their own testimony as to their understanding of their agreement. On that facet, Blumenthal testified but Reiner failed to testify. Blumenthal testified that it was his understanding, "That those notes would be paid and he would pay me for my stock $59,000 ($55,949.70) the book value, and we would just call it a day." (Defendant's appendix 95). And further, he testified under cross examination, "the notes applied against my stock because the stock was worth twice the amount of the notes." (Defendant's appendix 95). And even further, he testified, "I agreed to take book value $59,000 ($55,949.70), and he agreed to pay me, and with that $59,000, I paid those $25,000 notes." (Defendant's appendix 91). Such understanding was never denied nor refuted by the respondents at the trial.

Most appropriate is the statement by Justice Black, in *Galloway* vs. *United States*, 63 S. Ct. 1077, 319 U. S. 372, 87 L. Ed. 1458, as follows:

> "The language of the Seventh Amendment cannot easily be improved by formulas. The statement of a district judge in Tarter v. United States, 17 F. Supp. 691, 692-693, represents, in my opinion, the minimum meaning of the Seventh Amendment:
>
> 'The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is

substantial evidence to support the claim of the plaintiff in an action. If a single witness testifies to a fact, sustaining the issue between the parties, or *if reasoning minds might reach different conclusions from the testimony of a single witness*, one of which would substantially support the issue of the contending party, *the issue must be left to the jury.* Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.' "

Nevertheless, the opinion of the Court below and the opinion of the District Court are both completely silent on the above uncontradicted crucial testimony, which alone demands a jury verdict.

The distinction between directing a verdict or granting a new trial after verdict was carefully drawn by Chief Judge Parker in the case of Garrison v. United States, 62 F. 2d 41, (C.C.A. 4th), in these words:

"There seems to be some confusion . . . as to the difference between the duty to direct a verdict and the duty to grant a new trial after verdict. The distinction, however, is clear . . . verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed, or where the evidence is all against him, or so overwhelmingly so as to leave no room to doubt what the fact is . . . Verdict may be set aside and a new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion, the trial judge thinks this action necessary to prevent a miscarriage of justice."

Accordingly, it was in the discretion of the trial judge to set aside the verdict and order a new trial, however, with

substantial evidence existing in behalf of the defendant, the trial judge did not have the right under the Seventh Amendment to grant the motion for judgment notwithstanding the verdict of the jury.

The memorandum decision of the District Court, in which the motion for judgment notwithstanding the verdict was granted, fails to find that there was no substantial evidence to support the verdict for the defendant, fails to consider the evidence in the light most favorable to the defendant, fails to draw all reasonable inferences in favor of the defendant, fails to abide by the established rules of construction, and deprives the defendant of his right to trial by jury as guaranteed by the Seventh Amendment. (Defendant's appendix 37, and objections and exceptions thereto 47).

The test on the granting of a motion for judgment notwithstanding the verdict, is whether or not "fair minded men may draw different inferences". *Tiller* v. *Atlantic Coastline R. R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

In the case before this Court, we have a situation where one man, the Judge of the District Court, was drawing utterly contradictory conclusions from the same evidence. It is for the jury under the law of this land to draw the final conclusions.

It is a fundamental and established rule of construction that where the language of an agreement is susceptible of two constructions, one of which makes it fair while the other makes it inequitable and unjust, the Court will prefer the construction that is equitable. *Fairbanks* v. *Twin City*, 170 N. C. 315, 86 S. E. 1051.

Such rule of law, although presented in briefs, was not considered by the lower courts. The facts are uncontradicted that the defendant has already paid to the plaintiffs the sum of $75,000.00 for which he has never received one penny. If the existing judgment of the District Court is permitted to prevail, the plaintiffs will receive another $25,000.00 plus interest making a total of $100,000.00. And still the defendant has never received a penny and never will receive anything for the money paid out. To permit the plaintiffs to take $100,000.00 under the circumstances is a harsh and unjust decision. The plaintiffs have all of the stock that they started with plus $75,000.00, yet they seek another $25,000.00 plus interest. In determining the equitable interpretation it is most significant that at the time the stock was purchased on October 1, 1948, the book value was approximately $56,000.00, for which the plaintiffs demanded a price of $190,000.00. In the agreement of January 23, 1951, the plaintiffs did not set the purchase price in paragraph 2(c) to be $190,000.00, nor what would have been the price at which the stock could have been sold at a public sale, but insisted that they could take the stock, in the event of default, at book value.

The equitable rule of interpretation is clear. For there to be some measure of justice in the interpretation, the judgment notwithstanding the verdict should be reversed and in addition the defendant should be entitled to recover the surplus of the book value over the notes from the plaintiffs on his third counterclaim.

The issue arising from the third counterclaim with respect to the right of the defendant to recover from the plaintiffs the difference between the amount of the notes and the book value of the capital stock is one that the defendant is entitled to have decided by a jury.

Actually what has happened is that the judges of the lower courts have re-examined evidence offered in a common lawsuit, weighed conflicting evidence and conflicting inferences, and then have held that the petitioner may never take this case to a jury. The statement of Justice Black in the dissent in *Galloway* v. *United States*, supra, is most appropriate:

> ". . . Either the judge or the jury must decide facts, and, to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. . . . So few of these cases come to this Court that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeals are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function . . ."

B. THE DECISION OF THE COURT BELOW CONDONES A FORFEITURE WHICH HAS BEEN DECLARED UNLAWFUL BY APPLICABLE STATE LAW.

All of the evidence conclusively shows that the 45 shares of capital stock were held by the Reiners as collateral. The agreement so states. (Par. 3, Defendant's appendix 23). Reiner so stated. (Defendant's appendix 71). Accordingly, the relationship that was created was one of pledge and the laws pertaining to pledges are part and parcel of the agreement. The existing law is part and parcel of every contract.

Farmers and Merchants Bank of Monroe v. *Federal Reserve Bank of Richmond*, 43 S. Ct. 651, 262 U. S. 649, 67 L. Ed. 1157.

The legal effect of a pledge depends upon the local law. *Dale* v. *Pattison*, 34 S. Ct. 785, 234 U. S. 399, 58 L. Ed. 1370.

The Rules of Decision Statute provides that "the laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply". Title 28, U.S.C.A. 1652. In *Huddleston* v. *Dwyer*, 64 S. Ct. 1015, 322 U. S. 232, 88 L. Ed. 1246, this Court stated:

> "It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision."

The pledge agreement was executed in the State of New York, accordingly, the Court below was required by statute and by the decisions of this Court to apply the law of the State of New York with respect to pledge.

In the State of New York, it is established law that any provision in an agreement for the forfeiture of a pledge is void. The rule was succinctly stated in the case of *First Trust and Deposit Co.* v. *Potter*, 278 N. Y. S. 847:

> "A provision in the contract that the absolute property in the collateral pledged shall, upon default, vest in the pledgee, is void."

For centuries, it has been a fundamental rule of the common law that the forfeiture of a pledge is contrary to public

policy. In the case of *Hawley* v. *Hawley*, 114 F. 2d 745 (C.C.A.-D.C.), the rule was stated as follows:

> "The pledgee is not entitled upon the pledgor's default to take the property as his own in satisfaction of the debt. A provision in the contract by which the absolute property in the pledge is to vest in the pledgee upon default of the pledgor is void, and the pledgor is still entitled to redeem . . . This is the universally accepted rule."

Regardless of the provisions of a pledge agreement, there must be a proper foreclosure in accordance with the law. A foreclosure would require a bona fide public sale wherein it would be the duty of the pledgee to secure the highest market price.

Article 9, Sec. 200, et seq. of the Lien Law of the Statutes of New York provides for a public sale, notice to the pledgor, and advertisement in a newspaper, and a public auction for a foreclosure on a pledge. Equity assigns to pledgor and pledgee a trust relationship wherein the pledgee holds the pledge as a fiducary for the pledgor. *In re Kiames Estate*, 309 N. Y. 329, 130 N. E. 2d 745. Furthermore, pledge contracts must be construed favorably for the interest of the pledgor. *Cole* v. *Manufacturers Trust Co.*, 299 N.Y.S. 418. Accordingly, there was no foreclosure in the eyes of the law.

It should be remembered that on October 1, 1948, the plaintiffs represented to the defendant-appellant that the value of 45 shares of capital stock was $190,000.00. The defendant-appellant has already paid $75,000.00 on account, and the judgment as it now stands would compel him to pay an additional $25,000 plus substantial interest without his ever having received one penny in value from the transac-

tion, and would also forfeit his stock. There has been no foreclosure under the law to determine the actual market value of the stock on the date that it was taken in order to determine what surplus, if any, should be paid to the petitioner.

The reference in 2(c) to survival of the notes can mean survival only in the event that the book value was less than the amount of the notes, if it can have any lawful meaning at all. In that respect, the Judge of the District Court stated:

> "The Court: I construed that to mean if the book value was less than the $25,000.00, then the remainder should survive." (R.p. 215).

If the decision of the Court below is allowed to stand as now written, then it constitutes a forfeiture and confiscation and is contrary to public policy.

The only manner in which the contract can be held to be legal is to hold that paragraph 2(c) means that the Reiners purchased the stock and for the book value of it, and they must deduct the amount of the promissory notes and pay the balance to Blumenthal. If a contract is susceptible of two meanings, the one which indicates its validity must be adopted. *Levine* v. *Susser*, 189 N.Y.S. 106.

The opinions of the Court below and the District Court are silent on the matter of forfeiture, yet both Courts were presented with ample citations of the authoritative law in both briefs and oral argument.

Accordingly, the decision of the lower Court in condoning the forfeiture of corporate stock pledged as collateral, is in conflict with applicable and established state law, and in

conflict with law established by the United States Court of Appeals for the District of Columbia, thereby depriving the petitioner of property without due process of law and contrary to "law of the land".

CONCLUSION

It is significant that the lengthy opinion of the Court of Appeals for the Fourth Circuit does not cite, discuss, nor distinguish any one of the many authorities cited in the briefs filed by each of the parties, except the three cases cited on the question of interest, which was merely an incidental part of the action and of the appeals.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

This the 17th day of October, 1957.

Respectfully submitted,

Maurice A. Weinstein of
WEINSTEIN AND MUILENBURG

Fred B. Helms and
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HELMS AND MULLISS

Attorneys for Petitioner,
Isadore D. Blumenthal

Appendix

OPINION OF

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7422.

Isadore B. Blumenthal,
Appellant,
versus
Leon Reiner and wife, Bertha Reiner,
Appellees.

No. 7382.

Isadore D. Blumenthal,
Appellant,
versus
Leon Reiner and wife, Bertha Reiner,
Appellees.

No. 7399.

Leon Reiner and wife, Bertha Reiner,
Appellants,
Isadore D. Blumenthal,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE.

(Argued June 10, 1957. Decided July 19, 1957.)

Before SOPER, SOBELOFF and HAYNSWORTH, Circuit Judges.

Francis E. Winslow and Harold D. Cooley (Hubert E. May; Cooley & May, and Battle, Winslow & Merrell on brief) for Appellants in No. 7399 and Appellees in Nos. 7382 and 7422; and Fred B. Helms, William H. Bobbitt, Jr., and Maurice A. Weinstein (Weinstein and Muilenburg, and Helms & Mullis on brief) for Appellee in No. 7399 and Appellant in Nos. 7382 and 7422.

SOPER, Circuit Judge:

This suit was brought by Leon Reiner and Bertha Reiner, his wife, of New York against Isadore D. Blumenthal of Charlotte, North Carolina, for the collection of two promissory notes aggregating $25,000.00 given by the defendant to the plaintiffs on January 23, 1951. The controversy arose out of a written contract dated October 1, 1948, wherein the Reiners sold and transferred 45 shares of the stock of L. and B. Reiner, Inc., a New York corporation, to Blumenthal for the sum of $190,000.00. The corporation had succeeded a partnership composed of the Reiners in the business of distributing and servicing surgical and medical requirements for a large part of the United States. The parties had known each other for many years and each of them had had extensive experience in the business world. A total of 90 shares of stock of the corporation were outstanding, so that by reason of the contract the Reiners and Blumenthal each owned a one-half interest in the enterprise. In payment for the stock, Blumenthal gave $50,000.00 in cash and twenty promissory notes in the aggregate sum of $140,000.00 payable over a period of ten years. The stock was deposited as collateral security for the payment of the notes. The Reiners became the president and secretary-treasurer, respectively, and Blumenthal the executive vice-president of the corporation.

The enterprise had been a profitable one but after 1948 the volume of the business and the profits steadily decreased and Blumenthal became dissatisfied with the bargain and did not pay the notes as they fell due. Some conferences between the parties took place and finally the parties reached a compromise during a visit of Blumenthal to New York. During this visit he was served with a summons in an action brought by the Reiners on the past due promissory notes in the Supreme Court of the State of New York. This suit, however, was dismissed when the parties signed an agreement of settlement on January 23, 1951, under which the two promissory notes in suit, one for $10,000.00 payable November 15, 1951, and one for $15,000.00 payable November 15, 1952, were given.

The pending controversy depends upon the construction of this agreement. The preamble referred to the sale of the stock under the prior contract of October 1, 1948, recited that the sum of $158,900.00, representing the balance of the purchase price of the stock with interest remained unpaid, and set out the desire of the parties to amend that agreement.

The body of the new agreement contained the following provisions:

Section 1 terminated and cancelled the agreement of October 1, 1948.

Section 2 declared that the unpaid balance of $158,900.00 of the purchase price of the stock should be paid as follows:

(a) Simultaneously with the execution of this agreement, Blumenthal will pay to Leon Reiner and Bertha Reiner jointly the sum of $25,000.00.

(b) Simultaneously with the execution of this agreement, Blumenthal will execute and deliver to Leon Reiner and Bertha Reiner two (2) promissory notes payable to their order with interest at three (3%) per cent per annum as follows: one note in the face amount of $10,000.00 payable on November 15, 1951, and one note in the face amount of $15,000.00 payable on November 15, 1952. Said notes shall provide that in the event the note first due is not paid on its due date, then the second note shall forthwith become due and payable.

(c) In the event of a default in the payment of either of the aforesaid notes, Leon Reiner and Bertha Reiner jointly shall forthwith be deemed to have purchased the said forty-five (45) shares of stock now owned by Blumenthal in the same manner as if an offer to sell the same had been made by Blumenthal at the book value thereof. The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive, Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute any action at law or otherwise to enforce collection of same.

(d) The balance of $108,900.00 with interest at three (3%) per cent from the date hereof shall thereafter be payable only out of dividends paid on the corporate stock now owned by Blumenthal, corporate salaries and bonuses or any other sums, if any, that may become due or payable to Blumenthal from the corporation. Blumenthal does hereby authorize the Corporation to pay over to Leon Reiner and Bertha Reiner jointly all such dividends, salaries and bonuses or any other sums, if any, that may become due and payable to him at any time on or prior to September 1, 1958, to be applied against said balance

of $108,900.00 until the same, plus accrued interest at three (3%) per cent, has been fully paid and discharged. If any balance, as aforesaid, remains unpaid on September 1, 1958, Blumenthal does hereby sell, transfer and assign the forty-five (45) shares of the corporate stock now owned by him to Leon Reiner and Bertha Reiner jointly, the purchase price to be the amount of said balance which shall be credited in full payment of said balance and said shares shall be and become the sole property of Leon Reiner and Bertha Reiner without any right of redemption thereto in Blumenthal with the same force and effect as if Blumenthal had offered the same for sale to Leon Reiner and Bertha Reiner at the amount of said balance and Leon Reiner and Bertha Reiner had accepted said offer.

(e) In the event of a dissolution or liquidation of the Corporation, any sums that may become due and payable as a result thereof on the shares of corporate stock now held by Blumenthal, are hereby assigned to Leon Reiner and Bertha Reiner jointly to apply against the balance of $108,500.00 with interest as aforesaid and only the surplus, if any, shall be delivered to Blumenthal.

3. Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum.

The decision in this case turns primarily on the interpretation of the foregoing sections of the agreement. A strong light, however, is thrown upon their meaning by subsequent provisions of the contract. Amongst other things, Section 5 declared the intent of the parties to maintain the capital of

the corporation for any losses sustained during each year until September 1, 1958, by making loans to the corporation whenever it should need additional working capital. The contributions were to be made in accordance with respective stock interests of the parties and each party agreed to pay his proportionate share of the loss during any six month's period within fifteen days after notice of the amount of the loss as determined by the corporation's accountants; and it was provided that if Blumenthal should fail to pay the amount required of him in such case within ten days, this should be deemed an acceptance by the Reiners of an offer by Blumenthal to sell his shares to the Reiners at the book value thereof. The agreement further provided that Leon Reiner would receive a salary of $15,000.00 a year and that Blumenthal and Bertha Reiner would receive equal salaries in amounts fixed by the Board of Directors. There were also provisions for giving the Reiners first opportunity to buy the Blumenthal stock in case he should determine to sell; provision for the ascertainment of the book value of the stock; provisions for the acquisition of the stock by the survivors in case of the death of one of the parties to the agreement; and, finally, provision for the execution by the parties of formal instrument releasing all of the parties from all obligations other than those contained in the agreement. Such releases were actually executed.

Blumenthal paid the sum of $25,000.00 in cash to the Reiners, and gave his notes for $25,000.00 as provided by the agreement; but the subsequent period of joint operation of the corporation, which was obviously contemplated to last at least until September 1, 1958, shortly came to an abrupt end. Prior to November 15, 1951, when the note for $10,000.00 came due, Blumenthal notified the Reiners that he would not pay the two notes, and on that date actually defaulted in the payment of the first note. In the

meantime, no reduction in the balance of the indebtedness in the sum of $108,900.00 had been made since no dividend had been declared by the corporation — and no salary or bonus had been paid or become due to Blumenthal. Thereupon the Reiners, in accordance with provisions of Section 2(c) of the settlement agreement, took over the 45 shares of Blumenthal's stock as purchasers. The book value of these shares at that time, according to the stipulation of the parties, was $55,949.70. After this default the present litigation ensued.

The Reiners brought suit in the District Court below upon the two promissory notes, the second note having become due under the agreement by reason of default on the first, and claimed judgment for $10,000.00 with interest at 3 per cent from January 3, 1951 until November 15, 1951, on the first note, and thereafter at the interest rate of 6 per cent until paid; and also judgment for $15,000.00 with interest at the rate of 3 per cent up to November 15, 1952, on the second note and thereafter interest at the rate of 6 per cent.

The defendant filed an answer denying liability for the amounts claimed in the complaint and filed three counterclaims. In the first counterclaim it was alleged that L. and B. Reiner, Inc., was never validly incorporated, in that the corporation did not have at least three directors and three stockholders as required by the laws of the State of New York and hence no capital stock of the corporation was ever validly issued and, therefore, the representations by the plaintiffs that the corporation was duly organized were false and fraudulent, whereby the defendant was deceived and induced to purchase 45 shares of the alleged stock. It was also alleged in the counterclaim that the plaintiffs had made certain representations as to the volume of business of the

corporation which were false and made with the intent to defraud the defendant and induce him to purchase the stock, and that the stock was purchased on the faith of these fraudulent representations; and also that the plaintiffs had grossly mismanaged the affairs of the corporation so that it suffered heavy losses. In consequence, the defendant claimed that the plaintiffs were indebted to him for the sum of $75,000.00, being the cash sums that he theretofore paid for the stock.

The second counterclaim was based on the allegation that through the foregoing circumstances the defendant was induced through the fraudulent acts and representations of the plaintiffs to execute the promissory notes in suit with the result that recovery on those notes were barred and the plaintiffs became indebted to the defendant for the sum of $75,000.00.

The third counterclaim sought the recovery of the sum of $32,645.00 from the plaintiffs, representing the difference between the alleged book value of the stock in the sum of $57,645.08 on November 15, 1951, and the aggregate sum of the two promissory notes of $25,000.00. The answer of the plaintiffs to the counterclaims set up denials of the pertinent allegations and denied liability.

The case came on for trial before the District Judge and jury and each party filed a motion for a directed verdict. In fact, it was agreed that the case was one for peremptory instruction by the Judge. The District Judge was in accord with this position. He refused to submit to the jury any issue with reference to the counterclaims of the defendant, thereby ruling that there was no evidence to support them. He submitted two issues to the jury with respect to the plaintiffs' suit on the notes: (1) whether the notes were

executed and were in default and (2) as to what amount, if any, the defendant was indebted to the plaintiffs. However it was agreed by the parties that the answer to the first question should be "Yes", and the Judge directed the jury to answer the second question with the word "Nothing", so that in effect a peremptory instruction in favor of the defendant was given and the judgment to this effect was entered. Subsequently, after careful re-examination of the case, on motion by the plaintiffs under Rule 50(b) of the Federal Rules of Civil Procedure, the Judge entered judgment n.o.v. for the plaintiffs for the amount due on the two promissory notes with interest at 3 per cent from the date of the note to the date of judgment. The defendant appeals (1) from the judgment in favor of the plaintiffs on the promissory notes, case No. 7422; and (2) from the judgment in favor of plaintiffs on defendant's counterclaims, case No. 7382; and plaintiffs appeal from the provision of the judgment in their favor on the promissory notes limiting the interest to 3 per cent between the due date of the notes and the date of the judgment, case No. 7399.

The principal controversy in the case relates to the application of the sum of $55,949.70, the stipulated value of the stock deposited as collateral. On the part of the plaintiffs, it is contended that the value of the stock should be applied against the balance of the debt ($108,900.00) remaining due after crediting the cash payment of $25,000.00 and the promissory notes of $25,000.00 that were given in the settlement of January 23, 1951. Under this interpretation the balance of the debt is reduced from $108,900.00 to $52,950.30 since the payment of the balance was to be made only out of moneys which should become payable to Blumenthal by the corporation prior to September 1, 1958, and this source of income has been cut off by the transfer of Blumenthal's stock to the Reiners and his complete severance

from the business. On the other hand, the defendant contends that the book value of the stock should be applied entirely to the indebtedness of $25,000.00 due on the notes with the result that the defendant is entitled to a judgment against the plaintiffs in his favor on his third counterclaim in the sum of $30,949.70, the excess of the purchase price of the stock over the amount due on the notes. Under this theory the defendant would be relieved from the entire obligation to pay the balance of the indebtedness of $108,900.00. In our view, the interpretation placed upon the agreement by the plaintiff, which was finally approved by the District Judge, is correct and must be sustained.

The situation of the parties at the time of the settlement of January 23, 1951, as disclosed by the undisputed evidence, was such that the interpretation of the defendant cannot reasonably be entertained. At that time Blumenthal was under an absolute obligation to pay to the Reiners the sum of $158,900.00 with interest on his unpaid promissory notes in accordance with the agreement of October 1, 1948. But the business in which he had purchased the one-half interest had not been as profitable as he expected and so he prevailed upon the Reiners, his long time acquaintances, to relieve him from his obligation and to give him more favorable terms. By the new arrangement the balance of $158,900.00 due by him under the 1948 agreement was reduced to $108,900.00 through the payment by him of $50,000.00 made up of $25,000.00 in cash and $25,000.00 in notes; and the absolute obligation to pay the balance of $108,900.00 was reduced to a contingent liability measured by the moneys which he would thereafter receive in dividends, salaries and bonuses in the interval between January 23, 1951 and September 1, 1958, a period of seven and three-quarter years.

Obviously the parties contemplated joint operation of the business for an extended period. It was agreed not only that

Blumenthal's dividends and compensation should be applied to the balance of the indebtedness until September 1, 1958, but also that in the meantime he would cooperate with the Reiners in making loans to the corporation if it should become necessary to do so in order to furnish it with adequate working capital. Provision, however, was carefully made for restricting Blumenthal's liability in the event he should fail to keep his promises, either to pay the notes aggregating $25,000.00 or to make the loans to the corporation as above described. In either case, the stock was to be bought by the Reiners at its book value and his connection with the enterprise would automatically terminate. It was also provided that if any balance of the debt of $108,900.00 should remain unpaid on September 1, 1958, the stock would be transferred to the Reiners and accepted as full payment of the balance due. But this was not all. Although the possibility of defaults on Blumenthal's part were contemplated, he was not at liberty to repudiate his promises at will, and it was specifically provided in Section 3 of the contract that pending payment in full of the balance due, in the sum of $108,900.00, the Reiners should hold the Blumenthal stock as collateral security for the payment thereof.

Keeping these facts in mind it is seen that the defendant's position is untenable. He contends that immediately upon the execution of the agreement of January 23, 1951, it lay within his power, by the simple device of declaring a default on the promissory notes, not only to wipe out the balance of the debt of $108,900.00, but also to nullify completely the clause that the stock should be held as collateral security for the payment thereof. Thus instead of owing $25,000.00 absolutely, and $108,900.00 contingently secured by the stock as collateral, he would owe only $25,000.00 on the notes and would become the seller of the stock at the book

value of $55,949.70, leaving a balance in his favor of $30,949.70.

Such a result could not possibly have been contemplated by the parties. They had just entered into a compromise settlement which substantially lightened the obligations of Blumenthal under the earlier agreement but obligated him, nevertheless, to maintain his connection with the enterprise and allowed the Reiners to retain his stock as collateral security for the payment of the balance of the debt. It is inconceivable in this situation that they intended to put it in his power immediately to destroy the only security which the Reiners had for the performance of this obligation. Two important factors must be kept in mind throughout the discussion: (1) that it was expressly agreed in Section 2(c) of the new agreement that, although upon default the Reiners would purchase the stock of Blumenthal, nevertheless, his obligation to pay the amount of the notes would survive; and (2) that the Blumenthal stock was not held as collateral security for the payment of the notes but, as collateral security for the payment of the balance of the debt in the sum of $108,900.00 under the terms of Section 3 of the agreement. This provided that the collateral should be held as security for the payment "of the balance aforesaid", which is described in Sections 2(d) and 2(e) as "the balance of $108,900.00".

The defendant's position is tenable only if attention is confined to the provisions of Section 2(c) of the agreement and the provisions of 2(d) under Section 3 are entirely ignored. Under the latter sections Blumenthal could have retained his interest in the corporation and devoted the moneys received from it to the payment of the balance of the debt until September 1, 1958, whereupon it would have

been automatically paid in full by the transfer of the Blumenthal stock to the Reiners, whatever its value at that time. But Blumenthal was unwilling to take this course. To the contrary, for purposes of his own, he gave up his stock in the corporation, severed his connection with the business, destroyed the only source from which the payment of the balance of his debt could be made, and refused to carry on as he had agreed. Undoubtedly he had the power under the agreement to take this course, but it nevertheless amounted to a default in the payment of the debt and justified the application of the collateral, as far is it would go, to its liquidation. Unless Section 3 of the agreement is given this effect upon the default of Blumenthal prior to September 1, 1958, it has not meaning at all.

The defendant argues that the terms of the agreement are ambiguous and therefore should have been submitted to the jury for their interpretation. We think, however, that the agreement is not ambiguous and agree with the position taken not only by the plaintiffs but by the defendant himself in the trial below, that the question was to be determined by the Judge.

There is no substance in the additional defenses and counterclaims of the defendant, under which it is asserted that the initial agreement was vitiated by fraudulent representations of the Reiners upon which Blumenthal relied; and, also, that the shares of stock in Blumenthal's name were invalidly issued because the corporation was organized with less than three stockholders and three directors and therefore never came into existence. The defendant, however, did not offer to show in what way he was deceived regarding the volume of the corporate business and there is no reason to believe that he did not know the pertinent facts as to the enterprise in which he was purchasing a one-half interest.

The facts as to the incorporation of the business seem to be that the two Reiners, and a third person who was the nominal owner of a single share of stock participated in the organization of the corporation, but afterwards the third person transferred the share to the Reiners. No New York decisions are cited in support of the contention that under such circumstances the corporation had no existence; but, in any event, the point is lacking in substance, since there is nothing to show that the Reiners did not endeavor in good faith to form a valid corporation and, more particularly, nothing to show that Blumenthal failed to get substantially what he intended to buy, or that he suffered any loss by reason of any imperfection in the corporate setup. Even if it be conceded that the corporation did not come into being, it is nevertheless true that Blumenthal purchased an interest in a business belonging to the Reiners, which he has now disposed of, and that, in the meantime, he has suffered no detriment by reason of the fact that he purchased an interest in a partnership rather than in a corporation, if such be the fact.

The cross-appeal of the Reiners is based upon the contention that the District Judge was in error in allowing only 3 per cent interest on the notes from January 23, 1951, until the date of judgment and 6 per cent thereafter. It is said that the court should have allowed interest at the legal rate of 6 per cent per annum prevailing in North Carolina from the date of default to the date of judgment. The amount involved is approximately $4,000.00. It is conceded that the inquiry should be directed to the intention of the parties as manifested in the contract and that the North Carolina law governs, since it is well settled that, where interest is due for the failure to pay a note which is made in one place but is to be paid in another, the law of the place

of payment governs the rate. See 11 Am. Jur. Conflict of Laws, §162. In the present instance the matter is not difficult of determination because the rate of interest was specifically provided in the notes themselves and also in Sections 2(b) and 2(c) of the agreement of settlement. In the latter it was provided that the notes should be payable with interest at 3 per cent per annum and that in case of default the Reiners would become the purchasers of the stock, but the obligation of Blumenthal "to pay the amounts set forth in said notes, together with interest, shall nevertheless survive". The inference is irresistible that the amount of interest to be paid after default was at the rate of 3 per cent as set forth in the preceding paragraph of the agreement. It is worthwhile to recall in this connection that under the original agreement of October 1, 1948, the Blumenthal indebtedness carried interest at the rate of 6 per cent, so that the reduction of the rate of interest to 3 per cent in the compromise agreement was clearly one of the concessions made to the debtor in order to lessen the burden of what had turned out to be an unfortunate contract on his part. The settlement, as we have seen, made express provision for the rights and obligations of the parties that would ensue in the event of a subsequent default by Blumenthal, and one of the provisions was that the obligation of Blumenthal to pay the notes, "together with interest", should nevertheless survive. We think the parties must have had in mind the specified rate of 3 per cent and not the legal rate of 6 per cent which prevails in North Carolina. See *Womble* v. *Little & Mordecai*, 74 N.C. 255; *Pass* v. *Shine*, 113 N.C. 284; *Wadesboro Cotton Mills* v. *Burns*, 114 N.C. 353.

The judgment of the District Court is

Affirmed.

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In the

Supreme Court of the United States

October Term, 1957

No. 569

ISADORE D. BLUMENTHAL,
Petitioner

v.

LEON REINER AND WIFE, BERTHA REINER,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1957

No. 569

ISADORE D. BLUMENTHAL,

Petitioner

v.

LEON REINER AND WIFE, BERTHA REINER,

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

At the risk of being thought frivolous, respondents suggest that the over-riding question in this case is whether the Court will countenance the petitioner's plan to "pay the man his money with a trick."*

Regularizing the case, the only question is:

Should this Court review a decision directing a verdict in a jury trial on the issue of the interpretation of a private contract when

*The quotation is from Hon. Heneage Finch, as Lord Chancellor Nottingham, the "Father of Equity", in Knight vs. Coke, Dec. 1673 (case No. 35 of Nottingham's Chancery cases, Selden Society Publications, Vol. 73, 1954. It was a mortgage redemption case in which the mortgagor claimed credit for profits received by the lessee under his lease and not as mortgagee in possession.).

(1) The contract was in writing, and

(2) There was no conflict in the evidence of the surrounding facts and circumstances, and

(3) The language of the contract, within the framework of the circumstances, permitted only one reasonable inference, and

(4) Counsel for petitioner agreed with counsel for the respondents and with the trial court on the record, that the issue was one of law for the court, and

(5) No federal question is involved?

The petition argues a second question which does not arise in the case at all. It is argued in vacuo. It relates to the legality of the title to the pledged property taken over by respondents under the contract rather than by foreclosure sale under New York law. This question could arise only in an action or upon a counterclaim for *redemption of the pledged property*. This question appears only in petitioner's *briefs*. It does not appear in any *pleading* filed by him, and is consequently ignored both by the District Court and by the Court of Appeals. The debt secured was $108,900, the book value of the pledged stock at the time title passed to respondents under the contract at that value was $55,949.70. No tender of any amount on the debt has ever been made. No allegation as to the market value of the stock appears. On the contrary, petitioner by his third counterclaim affirms the validity of the transfer to respondents at the value of $55,949.70, and seeks recovery of *that amount* as an offset to his notes of $25,000, and prays a judgment over against respondents for the balance, $30,949.70. So the second question stated in the petition, and the argument thereon, are completely irrelevant in this case.

Petitioner has abandoned other defenses made below, dis-

cussed on page 8 of the opinion below (see petition pages 41-42), to-wit:

(1) That the stock was never validly issued, and was therefore "worthless", (2) fraudulent representations, and (3) mismanagement of the corporation by respondents. Since the question of "forfeiture of pledged property" has been lugged into the case only by *argument* without pleading or proof, the question as stated in this brief in opposition is the only question in the case.

CONCISE STATEMENT OF CASE

The opinion of the Court of Appeals by Judge Morris A. Soper (petition p. 35) concisely states the case, and that statement of the facts is adopted by respondents, to avoid useless repetition. Reported 247 F. 2d 461.

ARGUMENT

Upon the written contract and the undisputed facts the Courts (both District Court and Court of Appeals) held untenable (pet. p. 45) the petitioner's position that "immediately upon the execution of the agreement of January 23, 1951, it lay within his power, by the simple device of declaring a default on the promissory notes, not only to wipe out the balance of the debt of $108,900, but also to nullify completely the clause that the stock should be held as collateral security for the payment thereof. Thus instead of owing $25,000 absolutely, and $108,900 contingently secured by the stock as collateral, he would owe only $25,000 on the notes and would become the seller of the stock at the book value of $55,949.70, leaving a balance in his favor of $30,-949.70. Such a result could not possibly have been contemplated by the parties." Accordingly, the District Judge cor-

rected his own initial error in directing a verdict for petitioner by setting that verdict aside and entering judgment n.o.v. for respondents, on motion under Rule 50(b), and the Court of Appeals affirmed.

Petitioner testified that the $25,000 in notes was regarded by the parties "the same as cash" (Appendix to Plaintiffs' Brief in Court of Appeals, page 25, transcript pages 381-382-383). The significance of this admission is that petitioner's principal contention was that the stock was collateral for the $25,000 in notes instead of the otherwise unsecured balance of $108,900. If the $25,000 in notes was regarded as cash, it is extraordinary that petitioner should contend that the stock was collateral for that cash. It is not customary to secure United States currency by collateral.*

Practically all of the evidence was documentary. There was no conflict in any of it that was competent. All the relevant and material facts were admitted by the parties. The only exception to this which is claimed by the petitioner is that the petitioner offered to testify over respondents' objection, as to his, the petitioner's, own understanding of the meaning of the written agreement, which was that if he defaulted in the payment of the notes, respondents would pay him the book value of the stock over and above the notes (Petition for Writ, page 26). Petitioner emphasizes "such understanding was never denied nor refuted by the respondents at the trial" (page 26). The same contention was made before the District Court and before the Court of Appeals. Respondents answered that they had requested and received a stipulation that their objection be regarded as having been made to every question to any witness "as to what the parties intended" (Tran-

* In view of the present market for long term Government Bonds, it is conceivable that someone might ask collateral for them, but not for United States currency.

script page 295). Respondents insisted and both the lower courts held that the evidence of petitioner as to his understanding of the contract was incompetent and, for that reason, the respondents did not testify on that point. The contract spoke for itself. Eliminating that offer of incompetent testimony, there is not a dispute in the record as to any fact. In rejecting the defendant's interpretation of the contract, the Court of Appeals held in its opinion (Petition for Writ, page 44):

> "The situation of the parties at the time of the settlement of January 23, 1951, *as disclosed by the undisputed evidence,* was such that the interpretation of the defendant (petitioner) cannot reasonably be entertained."

Both the District Court and the Court of Appeals decided that the contract was not ambiguous and, therefore, should not have been submitted to the jury for their interpretation, and the Court of Appeals said it agreed "with the position taken not only by the parties but by the defendant himself (petitioner) in the trial below, that the question was to be determined by the Judge" (Petition for Writ, page 47).

Petitioner now takes issue with that finding by the Court of Appeals as to the position he took in the trial, that the issue was one of law for the Court.

The record sustains the Court of Appeals in its finding on this fact (Transcript page 501, lines 1-8 (plaintiffs' reply appendix 32)):

> "Defendant's Counsel: Your Honor looked at the contract, went down the contract and said 'here is what it is, and it's as clear as the noon-day sun'. Now, if that is correct . . . *and we say it is* — then *it is for Your Honor to say what the contract means.* Now, I don't

see that there can be but one question,—that is, I *think the whole case is a matter for peremptory instructions by Your Honor.*" (Emphasis supplied)

Transcript 525, lines 14-19 (plaintiffs' reply appendix 33):

"The Court: Now, let me hear from our friend Mr. Winslow over here. He says he is chomping at the bit.

"Mr. Winslow: If the Court pleases, I was very happy to hear Fred say that he agreed with us that *it is a matter for the Court,* that it is your responsibility and *there is no jury in it. That ought to settle that.*

"After the colloquy between Court and counsel on page 525 just quoted, *there was no dissent from defendant's counsel.*"

Upon the written contract and the undisputed and admitted evidence, excluding from consideration the incompetent testimony of petitioner as to his personal understanding, the District Court directed a verdict interpreting the contract as pledging the stock solely for the otherwise unsecured balance of $108,900 and applying the value of the pledged stock when it was taken over to the satisfaction of that balance as contemplated by the parties and awarding a recovery to the plaintiffs (respondents) on the two notes of $25,000.

Both the District Court and the Court of Appeals ignored petitioner's contention, made only in his briefs, that there was illegal forfeiture of pledged property. Both Courts held that the stock was pledged as security for the balance of $108,900. The stipulated book value of the stock on November 15, 1951, was $55,949.70. Petitioner has never tendered any amount on the balance of $108,900 for which the stock was security and *has never asserted by action or counterclaim any right to redeem the property from the*

pledge. He has not even alleged that the stock was worth more than $108,900 for which it was pledged. Although it was worth $55,949.70, the respondents accepted the stock under the contract in full satisfaction of the balance of $108,900 from which petitioner was relieved by the contract of personal liability.

Both Courts held that no reasonable person could be found by any tribunal, upon the contract and facts in evidence and undisputed, to have intended that under the contract, petitioner was to be relieved of the personal debt of $158,900 by paying $25,000 in cash and $25,000 in notes, with power reserved in petitioner, of his own head, and against the will of respondents, to default in the payment of his $25,000 in notes and thereby cancel his notes for $25,000 and recoup for himself the other $25,000 he paid in cash, and recover of respondents an additional $5,949.70 as partial reimbursement for the original $50,000 he had paid on the stock October 1, 1948. It is petitioner's contention that he is entitled to just that. (See second paragraph on page 29 of Petition for Writ.)

It is this remarkable contention by petitioner which moved respondents to open their brief with the following statement:

> "The over-riding question in this case is whether the Court will countenance the Petitioner's plan to 'pay the man his money with a trick'," a quotation from Lord Nottingham.

Petitioner belabors the contention that he has been denied the Constitutional right of trial by jury because he did not waive a jury trial. *He had a jury trial.* The direction of the verdict when the facts are not in dispute, and only one reasonable inference can be drawn as to the ultimate fact, is *only an incident to trial by jury.* And such disposition of the case is peculiarly appropriate when the party demanding

and getting a jury trial agrees in open court that "the whole case is a matter for peremptory instructions by Your Honor" (Plaintiffs' reply app. 32. Transcript p. 501).

MATTER OR CAUSE WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

The case does not fit into any one of the categories set forth in Rule 19 describing the "considerations governing review on certiorari".

The case involves the interpretation of a private contract, which was in writing, upon undisputed evidence of surrounding facts and circumstances, and the application of payments arising out of the proceeds of pledged property. The contract is unique to fit a unique situation. Its like has not been seen before nor is it likely to be seen again. The principles of law are simple and not in dispute. Respondents have cited no authorities on the law, because this case involves nothing but a factual determination under settled rules of law.

Petitioner strains in his petition to raise a Federal question, his right to jury trial under the Constitution, due process of law, etc. However, the case involves only the propriety of a directed verdict where the contract is in writing, the facts are admitted and not in dispute, and counsel on both sides concede that the question involved is one of law for the Court and not for the jury. The directed verdict was warranted by every decision of every Court, District, Court of Appeals and Supreme Court, dealing with the propriety of directing a verdict in the District Court of the United States. No public question is involved, and no conflict of decision between circuits is involved, and the decision is in accord with the accepted and usual course of judicial proceedings.

The trial was unusual in that the petitioner brought in so many irrelevancies that the trial was extended for four days and the record is in several volumes. The Trial Judge was under great strain, for reasons he did not disclose to counsel until after the trial. His sister was on her deathbed, he was driving over 40 miles each night of the four-day trial to see her, and she died the night of the day the trial ended. He was at times misled into making rulings which he later found it necessary to reverse. After he erroneously directed a verdict in favor of the defendant, and the plaintiffs moved under Rule 50(b) for judgment, n.o.v. he had time to further reflect upon the case and realized its simplicity and corrected his own error by setting aside the verdict he had directed in error, and rendered judgment for the plaintiffs. It is noted with some amazement that petitioner in his petition for Writ quotes the rulings and remarks made by the trial judge during the early part of the trial, which that judge later reversed, as authorities in behalf of the petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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